

Living in Uncertain Times: The Need to Strengthen Hong Kong Transnational Insolvency Law

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The author, an American academic in Hong Kong, argues that Hong Kong should reform its transnational insolvency law before 1997. He first examines the options available under Hong Kong law for protecting the assets of a foreign debtor and for obtaining cross-border assistance from Hong Kong courts, including non-insolvency options, the winding up of foreign companies, and the bankruptcy of individuals. He also summarizes the position in England, the United States, and China regarding the granting of recognition and assistance to Hong Kong insolvencies. He then discusses economic, political, and legal developments that will affect the post-1997 evolution of Hong Kong transnational insolvency law and the treatment of Hong Kong insolvencies by foreign courts. The author critiques recent law reform proposals, highlights weaknesses in the existing legislative and case law framework, and proposes many amendments to Hong Kong transnational insolvency law. He also calls on Hong Kong and China to enter into a bilateral cross-border insolvency agreement and to take steps to maintain confidence in the administration and adjudication of Hong Kong insolvencies after 1997.

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I. INTRODUCTION

One of the important ramifications of the approach of 1997 is the flurry of law reform in Hong Kong. The law of insolvency has been no exception. In 1990, the Law Reform Commission of Hong Kong (the "Law Reform Commission") appointed a Subcommittee on Insolvency (the "Subcommittee on Insolvency") to review the law and practice relating to the bankruptcy of individuals and the liquidation of companies.¹ In mid-1993, the Subcommittee on Insolvency issued its first interim report, the Consultative Document on Bankruptcy,² in which it proposed a broad range of changes to the Hong Kong Bankruptcy Ordinance (the "Bankruptcy Ordinance").³ Most of its proposals, with a few important exceptions, were adopted by the Law Reform Commission in its Report on Bankruptcy,⁴ issued in May 1995. It is anticipated that the Law Reform Commission's bankruptcy proposals will be enacted in May 1996.

Meanwhile, in June 1995, the Subcommittee on Insolvency issued its second interim report, addressing corporate rescue and insolvent trading (the "Corporate Rescue and Insolvent Trading Consultation Paper").⁵ The Subcommittee has now turned its attention to a consideration of the overall context of insolvency law, which will form the basis for the Subcommittee's final report. In addition, the Hong Kong Government has appointed Mr. Ermanno

1. In Hong Kong, the insolvency law of individuals is separate from that of companies. The former is called bankruptcy law and is contained in the Bankruptcy Ordinance, cap. 6, Laws of Hong Kong [hereinafter L.H.K.] (1995) and the latter is called liquidation law and is contained in the Companies Ordinance, cap. 32, L.H.K. (1995). In Hong Kong, the term "winding up" is synonymous with "liquidation." The insolvency of a partnership is usually administered under the Bankruptcy Ordinance, but administration under the liquidation procedures for unregistered companies may be possible in some instances. *See infra* note 80. Provisions for restructuring (reorganizing) insolvent companies are also contained in the Companies Ordinance, but they are rarely used. *See* Companies Ordinance § 166; Booth, *supra* note *, at 48-49.

In this article, the terms "bankruptcy," "liquidation," and "winding up" retain their Hong Kong meanings. The term "insolvency" refers to the broad variety of insolvency proceedings noted above.

2. THE LAW REFORM COMMISSION OF HONG KONG SUBCOMMITTEE ON INSOLVENCY, CONSULTATIVE DOCUMENT ON BANKRUPTCY (July 1993) [hereinafter CONSULTATIVE DOCUMENT ON BANKRUPTCY].

3. Cap. 6, L.H.K. (1995).

4. THE LAW REFORM COMMISSION OF HONG KONG, REPORT ON BANKRUPTCY (May 1995) [hereinafter REPORT ON BANKRUPTCY].

5. THE LAW REFORM COMMISSION OF HONG KONG SUBCOMMITTEE ON INSOLVENCY, CORPORATE RESCUE AND INSOLVENT TRADING CONSULTATION PAPER (June 1995) [hereinafter CORPORATE RESCUE AND INSOLVENT TRADING CONSULTATION PAPER].

Pascutto, the former Deputy Chairman of the Hong Kong Securities and Futures Commission, to conduct a separate overview of the Hong Kong Companies Ordinance (the "Companies Ordinance").⁶ This review might also lead to recommendations regarding insolvency law.

To date, the Subcommittee on Insolvency and the Law Reform Commission have addressed only a few transnational insolvency issues, although the Subcommittee intends to discuss cross-border insolvency more fully in its final report. Cross-border insolvency is of growing importance in Hong Kong. Hong Kong's transnational insolvency law is also of interest to the international legal and business community, as it attempts to assess the effect of 1997 on trade and investment in Hong Kong.

This article focuses on the need to reform Hong Kong transnational insolvency law before 1997 and puts forward many recommendations for the Subcommittee on Insolvency to consider in its final report. Part I offers an introduction to transnational insolvency law and sets out general paradigms for resolving transnational insolvency issues. Part II examines the options available under Hong Kong law for protecting the assets of a foreign debtor in Hong Kong and for obtaining cross-border assistance from Hong Kong courts. First, this part sets out Hong Kong (and relevant English) rules regarding the recognition of foreign insolvencies. A summary follows of the options for gaining cross-border assistance in Hong Kong, which include the following: non-insolvency options, the liquidation (or winding up)⁷ of foreign companies under the Companies Ordinance, and the bankruptcy of foreign individuals under the Bankruptcy Ordinance. This section also discusses recent Hong Kong case law and law reform proposals, highlights serious weaknesses and omissions in the existing legislative and case law framework, and proposes relevant amendments to Hong Kong's cross-border insolvency law. Part III briefly summarizes the position in England, the United States, and China regarding the granting of recognition and assistance to Hong Kong insolvencies. Recent cases are noted. Part IV examines economic, political, and other legal developments in Hong Kong and China (many of which are directly related to 1997), which will have repercussions for the post-1997 evolution of Hong Kong's transnational insolvency law. Also discussed are those factors that will affect whether foreign courts will recognize and assist Hong Kong insolvencies after 1997. This part proposes other recommenda-

6. Cap. 32, L.H.K. (1995).

7. See *supra* note 1.

tions to strengthen Hong Kong's law relating to cross-border insolvency and to increase the likelihood that overseas courts will continue to recognize and assist Hong Kong insolvencies.

II. INTRODUCTION TO TRANSNATIONAL INSOLVENCY LAW

Transnational insolvency law is founded largely on private international law.⁸ In a typical case involving the insolvency of a company incorporated in and with its primary place of business in Country A, but with assets in Country B, the issues arise whether the liquidator or trustee (the "foreign representative")⁹ from Country A will be able to protect the company's assets in Country B from the actions of creditors and whether the Country B court will order the return of the assets to Country A for distribution there to all of the company's creditors. In resolving these issues, two important questions arise under the law of country B: (1) What effect does the declaration of insolvency in Country A have on the property in Country B?¹⁰ and (2) May a second insolvency be commenced in Country B pursuant to which Country B's insolvency law will be applied to resolve matters involving the foreign company's assets in Country B?¹¹

With respect to the first question, assume that Country A's law extends to property in Country B, that is, that property abroad is part of the insolvency estate in Country A and that the foreign representative from Country A is entitled to go abroad and claim the property in Country B. If Country B's transnational insolvency law recognizes the extraterritorial scope of Country A's law and allows the foreign

8. Although much effort has been exerted in negotiating multilateral transnational insolvency treaties, most efforts have proved unsuccessful. See, e.g., Kurt H. Nadelmann, *Discrimination in Foreign Bankruptcy Laws Against Non-Domestic Claims*, 47 AM. BANKR. L.J. 147, 147-48 (1973). Perhaps the E.C. Convention on Insolvency Proceedings, recently opened for signature, will prove to be a welcome exception to this trend.

9. Different countries use different terminology. In the United States, the representative of an estate in a liquidation is called a "trustee," 11 U.S.C.A. §§ 701, 702 (1995), and in a reorganization is called either a "debtor in possession," 11 U.S.C.A. §§ 1101(1), 1107, or a "trustee," 11 U.S.C.A. § 1104. In Hong Kong, the representative of a bankrupt's estate is called a "trustee." Bankruptcy Ordinance § 23. Technically, there is no estate created in a liquidation in Hong Kong. Therefore, in a company's liquidation the representative belongs to the company and its creditors and is called a "liquidator." Companies Ordinance §§ 193, 194. For the purposes of this article, a trustee or liquidator may also be referred to as a "foreign representative."

10. See LOUIS JACQUES BLOM-COOPER, *BANKRUPTCY IN PRIVATE INTERNATIONAL LAW* 14-18 (1954).

11. This question is often phrased as a matter of jurisdiction. See *id.* at 14-15.

representative from Country A to claim the property in Country B, Country B is said to have adopted the "universality" approach to transnational insolvency law. In contrast, if Country B's law does not recognize the extraterritorial scope of Country A's law and does not allow the foreign representative from Country A to claim the assets in Country B, Country B is said to have adopted the "territoriality" approach to transnational insolvency law.

With respect to the second question, if Country B's law does not permit a separate insolvency proceeding to be commenced in Country B, and Country B defers to the application of Country A's insolvency law with respect to the company's assets in Country B, Country B is said to have adopted the "unity" approach. On the other hand, if Country B's law permits the commencement of a separate liquidation proceeding in Country B to adjudicate claims to the company's assets in Country B under Country B's insolvency law, Country B is said to have adopted the "plurality" approach.¹²

Although it is true that the universality approach is distinct from the unity approach, "[t]he most comprehensive way to conceive of universality is the idea of 'unity' of bankruptcy."¹³ Thus, it is helpful to combine these two questions when addressing transnational insolvency problems. One could envision a universality continuum that runs from a "universality/unity" approach to a "universality/plurality" approach.¹⁴ An example of the universality/unity approach would be where Country B (1) recognizes and gives effect to the insolvency proceedings in Country A, (2) assists the foreign representative from Country A, (3) applies the substantive insolvency law of Country A (such as avoidance powers, if so applicable), and (4) orders that the foreign debtor's assets in Country B be turned over to Country A. An independent insolvency proceeding would not be commenced under the law of Country B. However, an "ancillary"

12. For further discussion of these various approaches, see BLOM-COOPER, *supra* note 10, at 11-17; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, §§ 403-09, at 565-72 (8th ed. 1883); John D. Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 633-35 (1980); Barbara K. Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153, 1154-55 (1985); Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 512-19 (1991).

13. Hans Hanisch, "Universality" versus Secondary Bankruptcy: A European Debate, 2 INT'L INSOLVENCY REV. 151, 151-52 (1993).

14. See *id.* at 152.

proceeding¹⁵ might be needed in Country B to assist the proceeding in Country A. All creditors from Country B who intend to share in the distribution of the debtor's assets would be required to submit claims in the insolvency proceeding in Country A.¹⁶

Under a universality/plurality approach, Country B would also recognize and give effect to the insolvency proceedings in Country A and assist the foreign representative from Country A with respect to certain assets, such as movable property not subject to prior attachment. However, Country B's law would permit the commencement of an independent insolvency proceeding in Country B in which Country B's substantive insolvency law (e.g., regarding priorities and the avoidance of local attachments) would be applied. At that point, depending on how much cooperation Country B wants to offer, the court in Country B could act in an ancillary capacity and order the turnover of local assets to Country A,¹⁷ permit a scheme of arrangement to be negotiated with Country A for the worldwide distribution of assets, or make a distribution to creditors under local law.

Lastly, under a territoriality/plurality approach, Country B would neither recognize nor assist the insolvency proceedings in Country A. A separate insolvency proceeding would be commenced in Country B to adjudicate all claims to the debtor's assets located there.

Cross-border cooperation is most extensive under a universality/unity approach, which is premised on the notion of equality of distribution to creditors worldwide. The administration of all claims in a single insolvency proceeding minimizes expenses, although it may at times cause inconvenience or hardship for individual creditors who must travel abroad to participate in the primary insolvency proceeding.¹⁸ Cross-border cooperation is less frequent when countries adopt a territoriality approach, which often leads to a full-scale insolvency proceeding in each jurisdiction in which a debtor's assets are located. Expenses are, therefore, greatest under the

15. The term "ancillary" proceeding is used in § 304 of the U.S. Bankruptcy Code. 11 U.S.C.A. § 304 (1995). See generally Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135, 148-217 (1992) [hereinafter *Recognition of Foreign Bankruptcies*]. The term has a different meaning under Hong Kong law not intended here. See *infra* note 17.

16. See Unger, *supra* note 12, at 1154.

17. In a Hong Kong corporate insolvency, this proceeding would be called an "ancillary winding up." See *Re Irish Shipping Ltd.*, [1985] H.K.L.R. 437. See also PHILIP ST. J. SMART, CROSS-BORDER INSOLVENCY 233-52 (1991).

18. See Unger, *supra* note 12, at 1154-55.

territoriality approach.

III. THE OPTIONS AVAILABLE UNDER HONG KONG LAW FOR PROTECTING THE ASSETS OF A FOREIGN DEBTOR IN HONG KONG AND FOR OBTAINING CROSS-BORDER ASSISTANCE FROM HONG KONG COURTS¹⁹

A. *Recognition of Foreign Insolvencies*

Under Hong Kong law, no statutory provision governs the recognition of foreign insolvencies;²⁰ rather, case law provides the guiding principles regarding recognition. Only a few reported Hong Kong cases exist concerning this topic, but Hong Kong courts also follow applicable English cases. These Hong Kong and English cases, and the writings of English law commentators, are discussed below.²¹

Inasmuch as Hong Kong draws a distinction between bankruptcy law and corporate liquidation law,²² it also draws a distinction between the recognition of foreign bankruptcies and the recognition of foreign liquidations. In short, foreign bankruptcies are recognized under Hong Kong law when (1) declared by a court in the jurisdiction in which the debtor was domiciled at the commencement of the bankruptcy²³ or (2) the debtor submits to the jurisdiction of the foreign court.²⁴ Some commentators support the proposition that a foreign bankruptcy should also be recognized when the debtor carries

19. Parts of this section have been condensed from Booth, *supra* note *, at 13-57.

20. However, prior to its repeal in 1985, the United Kingdom Bankruptcy Act, 1914, 4 & 5 Geo. 5, ch. 59, §122 [hereinafter the U.K. Bankruptcy Act 1914], which provided for cooperation among bankruptcy courts throughout the Commonwealth, was applicable in Hong Kong. See Booth, *supra* note *, at 17 n.82.

21. For a discussion of the application of English law in Hong Kong and the effect of English judicial decisions on Hong Kong courts, see Booth, *supra* note *, at 13-16. For a more detailed analysis of this, at times, complex topic see Peter Wesley-Smith, *The Reception of English Law in Hong Kong*, 18 H.K.L.J. 183 (1988); Peter Wesley-Smith, *The Effect of 'De Lasala' in Hong Kong*, 28 MALAYA L.R. 50 (1986).

22. See *supra* note 1.

23. *Modern Terminals (Berth 5) Ltd. v. States S.S. Co.*, [1979] H.K.L.R. 512, 513 (citing the English case, *Re Blithman*, (1866) L.R. 2 Eq. 23). See also the following commentators, who discuss English law and cite *Re Blithman*: 2 DICEY & MORRIS ON THE CONFLICT OF LAWS, Rule 167(2)(a) and accompanying Comment, at 1172-74 (12th ed. 1993) [hereinafter 2 DICEY & MORRIS]; SMART, *supra* note 17, at 83.

24. *Modern Terminals* 1979 H.K.L.R. at 513 (1979) (citing the English case, *Re Anderson* (1911) 1 K.B. 896). See also 2 DICEY AND MORRIS, *supra* note 23, Rule 167(2)(b) and accompanying Comment, at 1172-74; SMART, *supra* note 17, at 85-86.

on business within the jurisdiction of the foreign court.²⁵

With respect to foreign liquidations, Hong Kong courts will as a rule recognize a foreign liquidation that is granted under the law of the place of the company's incorporation.²⁶ However, other grounds exist upon which recognition may be based,²⁷ including the following: (1) that the company carries on business within the jurisdiction of the foreign court;²⁸ (2) that the company submits to the insolvency jurisdiction of the foreign court;²⁹ or (3) that a liquidation is unlikely to take place in the jurisdiction in which a company is incorporated.³⁰

Hong Kong courts must sometimes decide whether to apply the rules regarding the recognition of foreign bankruptcies or the rules regarding the recognition of foreign liquidations. In *Modern Terminals (Berth 5) Ltd. v. States Steamship Co.*,³¹ this issue arose in the context of whether to recognize the rehabilitation of a U.S. company under Chapter XI of the United States Bankruptcy Act of 1898 (the "U.S. Bankruptcy Act of 1898").³² The Hong Kong court noted that the U.S. Bankruptcy Act of 1898 dealt with corporate liquidations, which in Hong Kong are governed by the Companies Ordinance, but the court nevertheless relied exclusively on bankruptcy rather than companies law precedent in deciding whether to recognize

25. IAN F. FLETCHER, *THE LAW OF INSOLVENCY* 574 (1990); SMART, *supra* note 17, at 86-92. Some commentators propose that a foreign bankruptcy should also be recognized on the basis of the residence of the bankrupt within the jurisdiction of the foreign court. See FLETCHER, *supra*; SMART, *supra* note 17, at 95-96.

26. See *Re Irish Shipping* 1985 H.K.L.R. at 439 (1985); 2 DICEY AND MORRIS, *supra* note 23, Rule 160 and accompanying Comment, at 1137-39, and SECOND SUPPLEMENT TO THE TWELFTH EDITION 99 (1995) [hereinafter SECOND SUPPLEMENT]; SMART, *supra* note 17, at 102-03.

27. But see J.W. Woloniecki, *Co-operation Between National Courts in International Insolvencies: Recent United Kingdom Legislation*, 35 INT'L & COMP. L.Q. 644, 656 (1986) (asserting that "[i]t is not clear whether the English court will recognize the jurisdiction of a foreign court to wind up a company in any case where the company is not incorporated under the law of that court").

28. SMART, *supra* note 17, at 107-08 (but noting that there might be limits to the consequences of such recognition); 2 DICEY AND MORRIS, *supra* note 23, Comment to Rule 160, at 1138.

29. SMART, *supra* note 17, at 108-09.

30. 2 DICEY AND MORRIS, *supra* note 23, Comment to Rule 160, at 1138-39; SMART, *supra* note 17, at 106-07. See also *Re Russo-Asiatic Bank*, 24 H.K.L.R. 16 (1930), *appeal dismissed*, 24 H.K.L.R. 100 (1930).

31. [1979] H.K.L.R. 512.

32. *Id.* at 513. United States Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978) [hereinafter the U.S. Bankruptcy Act of 1898].

the U.S. rehabilitation proceedings.³³

The approach of the English case of *Felixstowe Dock and Railway Co. v. United States Lines Inc.*,³⁴ offers an alternative to the *Modern Terminals* approach.³⁵ This case involved the recognition of insolvency proceedings in which a U.S. company was reorganizing under Chapter 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code").³⁶ The court treated the case as one involving the recognition of a foreign liquidation³⁷ and its approach is thus preferable to that employed in *Modern Terminals*.³⁸

Even if a foreign debtor fulfills the above criteria for the recognition of a foreign bankruptcy or liquidation, recognition may nevertheless not be forthcoming. A Hong Kong court may refuse to grant recognition (1) where the recognition of the foreign insolvency would be contrary to Hong Kong public policy;³⁹ (2) where the foreign insolvency decree was made as a result of fraud or is in breach of the rules of natural justice;⁴⁰ or (3) where the foreign insolvency proceedings are an attempt to enforce a foreign penal or revenue law.⁴¹

A serious weakness in both the Bankruptcy Ordinance and the Companies Ordinance is the failure to include provisions regarding the recognition of foreign insolvencies. In this area of the law, especially with 1997 fast approaching, it would be best for the common law approach to be supplanted by detailed statutory guidelines. Ideally, these guidelines should also expand the existing recognition criteria. Definitions of the terms "foreign representative" and "foreign proceeding" should be enacted, perhaps by adapting the definitions currently included in the U.S. Bankruptcy Code.⁴²

For example, "foreign representative" could be defined as a

33. *Modern Terminals*, [1979] H.K.L.R. at 514-21.

34. *Felixstowe Dock and Railway Co. v. United States Lines Inc.*, [1989] Q.B. 360.

35. See SMART, *supra* note 17, at 114-15.

36. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in 11 U.S.C.A. (1995), in scattered sections of 28 U.S.C.A. (1995), and in scattered sections of other titles).

37. SMART, *supra* note 17, at 114. *Felixstowe Dock*, [1989] Q.B. 360.

38. SMART, *supra* note 17, at 114-15.

39. *Id.* at 117-18.

40. *Id.* at 118-23.

41. *Id.* at 125-31. In cases involving the enforcement of foreign revenue laws, it is generally accepted that this exception to recognition should apply only where the sole object of the foreign proceedings is to enforce foreign revenue laws. *Id.*

42. See 11 U.S.C.A. §101(23), (24) (West 1995).

“duly selected trustee, liquidator, receiver, receiver and manager, administrator, or other representative of an estate or company in a foreign proceeding.” “Foreign proceeding,” in turn, could be defined as follows:

a proceeding, whether judicial or administrative and whether or not under bankruptcy, liquidation, or other insolvency law, in a foreign country in which:

- (a) in a case involving an individual or partnership
 - (1) the debtor's domicile, residence, or principal assets were located at the commencement of such proceeding;
 - (2) the debtor carried on business at the commencement of such proceeding; or
 - (3) the debtor submitted to the jurisdiction of the court; and
- (b) in a case involving a company
 - (1) the company was incorporated at the commencement of such proceeding;
 - (2) the company carried on business at the commencement of such proceeding;
 - (3) the company's principal assets were located at the commencement of such proceeding; or
 - (4) the company submitted to the jurisdiction of the court

as the case may be, for the purpose of liquidating an estate or winding up a company, adjusting debts by composition, extension, or discharge, or effecting a reorganization or restructuring.

The term “foreign proceeding” is especially important and, as can be seen above, should set forth the required jurisdictional connection between the foreign debtor and the foreign jurisdiction that would justify the granting of recognition by a Hong Kong court to a foreign bankruptcy or liquidation. Attention should also be given to resolving cases in which a Hong Kong court is confronted with requests for recognition and assistance by foreign representatives from two or more jurisdictions. In my view, as a general rule, preference should be given in bankruptcy to the jurisdiction in which the debtor was domiciled at the commencement of the insolvency, and in liquidation, to the jurisdiction in which the foreign corporation had its

primary place of business.⁴³

B. The Options Available for Protecting the Assets of a Foreign Debtor in Hong Kong and for Obtaining Cross-Border Assistance from Hong Kong Courts

1. Non-Insolvency Options

Under Hong Kong law, once recognition is granted, the next issue that arises concerns the types of assistance that may be forthcoming.⁴⁴ It is clear that Hong Kong courts have the inherent jurisdiction to assist a foreign representative from any jurisdiction.⁴⁵ A variety of options may be pursued to protect the assets of a foreign debtor in Hong Kong and to obtain cross-border assistance from the Hong Kong courts.

The English case of *Galbraith v. Grimshaw*,⁴⁶ decided in 1910, remains applicable in Hong Kong to this day.⁴⁷ This case stands for the principle that a foreign order vesting title in a foreign trustee operates to vest in the foreign trustee movable (personal) property in Hong Kong that is not subject to prior attachment, execution, or valid charge—provided the foreign law extends to movable property in Hong Kong.⁴⁸ Thus, a foreign trustee will be able to claim such

43. Given that many Hong Kong companies have “redomiciled” overseas, adoption of this test would be consistent with a related principle that should be adopted, namely, that, as a general rule the primary liquidation of any former Hong Kong company that has reincorporated elsewhere, but has retained its primary place of business in Hong Kong, should take place in Hong Kong. See *infra* notes 123-24 (noting the number of overseas companies that are listed on the Hong Kong Stock Exchange and the number of local companies that have redomiciled overseas).

However, preferring the jurisdiction in which the foreign company was incorporated would be more consistent with existing case law.

44. SMART, *supra* note 17, at 79, 135.

45. See *id.* at 259. See also the English case of *In re Kooperman*, 1928 W.N. 101 (discussed in *id.* at 98). Prior to its repeal in 1985, § 122 of the U.K. Bankruptcy Act 1914 provided statutory authorization for granting assistance to bankruptcy trustees from Commonwealth jurisdictions.

46. *Galbraith v. Grimshaw*, [1910] App. Cas. 508.

47. See *Modern Terminals*, [1979] H.K.L.R. at 517, 523, 525.

48. See 2 DICEY & MORRIS, *supra* note 23, Rule 169 & accompanying Comment, at 1175-77, and SECOND SUPPLEMENT, *supra* note 26, at 102; SMART, *supra* note 17, at 140. See also P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 912 (12th ed. 1992) [hereinafter CHESHIRE & NORTH] (noting that “[t]he English courts have consistently applied the doctrine of *universality*, according to which they hold that all *movable* property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee.”) (emphasis in original). But see Kurt H. Nadelmann, *Solomons v. Ross and International Bankruptcy Law*, 9 MOD. L. REV. 154, 163 (1946)

property in Hong Kong without seeking the assistance of the Hong Kong courts.⁴⁹ The same is true in the case of a foreign liquidator vested under foreign law with title to the company's assets.⁵⁰

Although title usually does not vest in a liquidator, Hong Kong law would most likely allow a foreign liquidator to represent a foreign corporation in Hong Kong and deal with its movable assets there, subject to any pre-existing attachment, execution, or charge,⁵¹ provided the foreign law extends to property in Hong Kong.

To gain control over a foreign debtor's immovable property in Hong Kong (as such property does not vest in the foreign representative), a foreign representative may seek to be appointed as the receiver of the foreign debtor's property in Hong Kong, with the power to sell the property and distribute the proceeds to the debtor's creditors after satisfying prior encumbrances.⁵²

Hong Kong law would also allow a foreign representative to commence civil proceedings, to seek declarations regarding the effect of foreign insolvency proceedings, and to recover debts.⁵³ The remedies available for debt collection in Hong Kong include the following: interim attachment of the debtor's property;⁵⁴ a writ of execution;⁵⁵ garnishee proceedings;⁵⁶ a charging order or stop order;⁵⁷ and an examination of a judgment debtor.⁵⁸ Hong Kong

(claiming that "[o]ne may wonder whether the theory of universality is part of English law" and concluding that whether a foreign trustee is entitled to collect local assets in England is a matter of discretion). See also *id.* at 161-62.

The foreign trustee's title may extend to after-acquired property in Hong Kong. See SMART, *supra* note 17, at 141-45. In addition, the English/Hong Kong rule has been to uphold the title of the foreign assignee over attachments made after the commencement of the foreign bankruptcy. CHESHIRE & NORTH, *supra*.

49. See SMART, *supra* note 17, at 140, 147-48; 2 DICEY & MORRIS, *supra* note 23, Rules 169, 170 and accompanying Comments, at 1175-79, and SECOND SUPPLEMENT, *supra* note 26, at 102.

50. See *Modern Terminals*, [1979] H.K.L.R. 512.

51. SMART, *supra* note 17, at 217. See also *id.* at 141, 149 n.17.

52. See 2 DICEY & MORRIS, *supra* note 23, Rule 170 & accompanying Comment, at 1178-79, and SECOND SUPPLEMENT, *supra* note 26, at 102; SMART, *supra* note 17, at 140-41. See The Rules of the Supreme Court, O. 30, cap. 4, sub. leg. A, L.H.K. (1995); Supreme Court Ordinance § 21L, cap. 4, L.H.K. (1995). The foreign representative should seek such relief through an application for an order in aid.

53. SMART, *supra* note 17, at 135.

54. The Rules of the Supreme Court, O. 44A, r. 7.

55. *Id.* O. 46, O. 47.

56. *Id.* O. 49.

57. *Id.* O. 50.

58. *Id.* O. 48.

law also provides for a variety of harsh legal methods for collecting debts, including the issuance of an order prohibiting a debtor from leaving Hong Kong⁵⁹ and the execution and enforcement of a judgment for money by imprisonment.⁶⁰ To pursue any of these options, the foreign representative must first prove that the foreign law permits him or her to commence the proceedings in Hong Kong.⁶¹

Hong Kong law also permits a foreign representative to submit a proof of debt in a Hong Kong insolvency. However, to claim her share of a distribution, a foreign representative must first comply with Hong Kong law.⁶² Under Hong Kong law, a foreign representative may also seek injunctive relief, including the entry of a stay of Hong Kong proceedings or execution,⁶³ or the entry of a Mareva injunction.⁶⁴

2. Winding Up

a. Introduction

Section 176 of the Companies Ordinance provides the Hong Kong High Court with the jurisdiction to wind up (or liquidate) any "company," which is defined in Section 2 of the Companies Ordinance.

59. *Id.* O. 44A, r. 2; Supreme Court Ordinance § 21B; District Court Ordinance § 52E(1)(a), cap. 336, L.H.K. (1995). See *Tam Hing-ye v. Wu Tai-wai*, 1 H.K.P.L.R. 261 (1991) (upholding the issuance of a prohibition order by the Hong Kong District Court under § 52E(1)(a) of the District Court Ordinance as not violating the Hong Kong Bill of Rights). For a discussion of this case, see 1(2) H.K. BILL OF RTS. BULL. 13-14 (Dec. 1991).

60. Rules of the Supreme Court, O. 49B; Supreme Court Ordinance § 21A.

61. SMART, *supra* note 17, at 139.

62. See *Re Kowloon Container Warehouse Co. Ltd.*, [1981] H.K.L.R. 210 (holding that a foreign creditor could not receive a distribution in a members' voluntary winding up until first paying a debt owed to the company being wound up).

63. See, e.g., *Modern Terminals*, [1979] H.K.L.R. 512 (refusing to order the stay of proceedings against a U.S. corporation undergoing rehabilitation under Chapter XI of the U.S. Bankruptcy Act, but granting a stay of execution). But see *Mobil Sales and Supply Corp. v. Owners of "Pacific Bear"*, [1979] H.K.L.R. 125 (refusing to order the stay of proceedings against a U.S. corporation undergoing rehabilitation under Chapter XI of the U.S. Bankruptcy Act of 1898).

64. A Mareva injunction is an interlocutory order sought to prevent a defendant from dealing with his assets and removing them from the jurisdiction in which they are located. Mark Gross, *Foreign Creditor Rights: Recognition of Foreign Bankruptcy Adjudications in the United States and the Republic of Singapore*, 12 U. PA. J. INT'L BUS. L. 125, 141-42 (1991); J. David Murphy, *Mareva Injunctions: Recent Developments*, in LAW LECTURES FOR PRACTITIONERS 1990 19 (J. David Murphy ed. 1990). However, the assets subject to a Mareva injunction are to be made available to creditors generally and are not security for the petitioner. Gross, *supra*, at 142; Murphy, *supra*, at 20.

nance as a Hong Kong company.⁶⁵ Foreign companies are wound up pursuant to provisions in Part X of the Companies Ordinance.⁶⁶ A foreign company in Hong Kong is called an "unregistered company;"⁶⁷ it is also called an "oversea company" if it has established a place of business in Hong Kong.⁶⁸ Although a foreign company is generally not considered to be a "company" as that term is defined in Section 2 of the Companies Ordinance,⁶⁹ it may be deemed to be a "company" to the extent provided by Part X of the Companies Ordinance.⁷⁰

It is often not necessary to commence a winding up to reach a foreign company's assets in Hong Kong. For instance, to the extent that movable assets in Hong Kong are not subject to any pre-existing attachment, execution, or charge, the foreign liquidator should be able to have the assets transferred to him as the representative of the foreign company or estate.⁷¹ Similarly, a foreign liquidator may attempt to be appointed as receiver of the foreign company's immovable property with the power to sell the property and distribute the proceeds to creditors.⁷² However, if these collection attempts prove unsuccessful, the foreign liquidator should consider commencing a liquidation of the foreign company.⁷³ Filing a petition for liquidation would also be advisable where unsecured creditors would benefit from some of the other advantages of liquidation, including the exercise of a liquidator's avoidance powers⁷⁴ (which are general-

65. Section 2 of the Companies Ordinance defines "company" as a "company formed and registered under this Ordinance or an existing company." An "existing company," in turn, is defined as a company formed and registered under earlier Hong Kong companies ordinances. Companies Ordinance § 2.

66. Companies Ordinance §§ 326-331A.

67. *Id.* § 326. See also *infra* text accompanying note 80.

68. *Id.* § 332. See also Securities and Futures Commission v. MKI Corp. Ltd., [1995] 2 H.K.C. 79 (holding that an "oversea company" may be wound up as an "unregistered company"), discussed *infra* in text accompanying notes 89-122.

69. See Insurance Co. of Pa. v. Grand Union Insurance Co., [1988] H.K.L.R. 541, 544 (dealing with an oversea company).

70. See Companies Ordinance § 331, discussed *infra* in note 88.

71. See *supra* note 51. Of course, the foreign law would have to extend to the property in Hong Kong.

72. See *supra* note 52.

73. See FLETCHER, *supra* note 25, at 615.

74. See Companies Ordinance § 269(1) (providing for the avoidance of attachments or executions that have not been completed prior to the commencement of a winding up); *id.* § 269(2) (providing how to complete an execution against goods, an attachment of a debt, and an execution against land); *id.* § 267 (providing for the avoidance of any floating charge granted by an insolvent company within twelve months of the commencement of the winding

ly not very extensive) or investigatory powers⁷⁵ or the application of the stay.⁷⁶ If a winding up order is made, the foreign liquidator may request the Hong Kong court to order the turnover of Hong Kong assets to the foreign liquidation for distribution abroad.⁷⁷

No provision in the Companies Ordinance expressly authorizes a foreign representative to commence a winding-up in Hong Kong of the foreign company that she represents, or whose estate she represents, in the foreign insolvency. Thus, if a foreign representative would like to commence a winding-up proceeding against the foreign company, she must either convince one of the foreign company's creditors to file the petition or file the petition herself on behalf of the foreign company.⁷⁸ Part X of the Companies Ordinance should be amended to provide explicitly that a foreign representative may petition in Hong Kong for the liquidation of the foreign company, or the estate of the foreign company, that she represents in the foreign proceeding.⁷⁹

up, except to the amount of any cash advanced to the company at the time of or after the creation of the charge, together with interest); *id.* § 266 (providing for the avoidance of any fraudulent preference made by or against the company within six months of the commencement of the liquidation).

75. *See id.* §§ 221-22.

76. A stay commences upon the making of the winding up order, or earlier upon the appointment of a provisional liquidator and prevents actions or proceedings from being continued or commenced against the company, except with the leave of court. *Id.* § 186. The stay, however, does not prevent secured creditors from exercising their rights in respect of their security. ROY M. GOODE, *COMMERCIAL LAW* 850-51 (2d ed. 1995). After the presentation of a winding up petition, but before the making of a winding up order or the appointment of a provisional liquidator, pending actions or proceedings against the company may be stayed or restrained. Companies Ordinance § 181.

77. A turnover order was made in the liquidation involving Irish Shipping Ltd. *Re Irish Shipping Ltd.*, Companies Winding Up No. 408 of 1984 (June 7, 1985).

78. The latter approach was used in *Irish Shipping Ltd.* [1985] H.K.L.R. at 439. The foreign representative would be able to make the filing pursuant to Companies Ordinance § 179(1), which provides that a winding up petition may be presented, *inter alia*, by the company itself or by any creditor or creditors. Companies Ordinance § 179(1). This section is applicable to the winding up of a foreign company pursuant to §§ 327(1) and 331 of the Companies Ordinance. *Id.* §§ 327(1), 331; *see also infra* note 88 and accompanying text.

79. Such a provision is currently contained in § 303(b)(4) of the U.S. Bankruptcy Code, which provides that an involuntary bankruptcy case may be commenced against a person "by a foreign representative of the estate in a foreign proceeding concerning such person." 11 U.S.C.A. § 303(b)(4) (West 1995). The Bankruptcy Code also defines "person" to include an individual, a partnership, and a corporation. 11 U.S.C.A. § 101(a)(41). Of course, the foreign representative should have to demonstrate that she was authorized under foreign law to commence the winding up in Hong Kong. *See Irish Shipping*, [1985] H.K.L.R. at 441-42.

b. Sections 326, 327, and 327A of the Companies Ordinance

Part X of the Companies Ordinance, entitled "Winding Up Of Unregistered Companies," contains the relevant sections for winding up foreign companies. Section 326 defines "unregistered company" to include any partnership, limited partnership, association, and company, except for the following:

- (a) a company registered under the Companies Ordinance 1865 (1 of 1865), or under the Companies Ordinance 1911 (58 of 1911), or under this Ordinance;
- (b) a partnership, association or company which consists of less than eight members and is not a foreign partnership, association, or company;
- (c) a partnership registered in Hong Kong under the Limited Partnership Ordinance (Cap. 37).⁸⁰

Section 327(1), in turn, provides that, subject to the provisions of Part X of the Companies Ordinance, any unregistered company may be wound up under the Companies Ordinance. Under Section 327(3), an unregistered company may be wound up under the following circumstances:

- (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- (b) if the company is unable to pay its debts;
- (c) if the court is of opinion that it is just and equitable that the company should be wound up.⁸¹

Most foreign companies in Hong Kong are wound up as "unregistered companies" under Section 327.⁸² Foreign companies may also be

80. Companies Ordinance § 326. Interestingly, although a "partnership" is not a "company" under § 2 of the Companies Ordinance, a Hong Kong partnership with eight or more partners and a foreign partnership are both defined as an "unregistered company" and may therefore be wound up under Part X of the Companies Ordinance. Bankruptcy proceedings may also be commenced against a partnership carrying on business in Hong Kong. Bankruptcy Ordinance § 7(1); *see also* Bankruptcy Ordinance § 109.

Amendments should be made to current law mandating that the insolvencies of partnerships be administered under either companies or bankruptcy law.

81. Companies Ordinance § 327(3). The Companies Ordinance defines the circumstances in which an unregistered company shall be deemed unable to pay its debts. *Id.* § 327(4). These criteria are somewhat broader than the criteria applicable to the winding up of Hong Kong companies. *Id.* § 178.

82. Philip Smart, *Cross-Border Insolvency*, in *LAW LECTURES FOR PRACTITIONERS* 1991 139, 142 (Jill Cottrell ed., 1991).

wound up under Section 327A of the Companies Ordinance,⁸³ although in practice this section is rarely used.⁸⁴ Section 327A, which is oddly entitled "Oversea companies may be wound up although dissolved," provides as follows:

Where a company incorporated outside Hong Kong which has been carrying on business in Hong Kong ceases to carry on business in Hong Kong, it may be wound up as an unregistered company under this Part [X of the Companies Ordinance], notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the place of its incorporation.

Philip Smart has noted, in reference to the English equivalent to the title of Section 327A of the Companies Ordinance, that the use of the term "oversea company" is inappropriate.⁸⁵ The same is true with respect to the use of the term "oversea companies" in the title to Section 327A; this term generally refers to a foreign company that has established a place of business in Hong Kong,⁸⁶ but a company incorporated outside Hong Kong need not have an established place of business to carry on business in Hong Kong.⁸⁷ This inaccuracy in the existing title of Section 327A should be corrected; the reference to "oversea companies" could be replaced with a reference to "foreign companies carrying on business in Hong Kong."

Pursuant to Sections 327(1) and 331 of the Companies Ordinance, in the winding up of unregistered companies, the provisions in Part X of the Companies Ordinance are supposed to supplement the other winding-up provisions contained in the Companies Ordinance.⁸⁸ However, Sections 327(1) and 331 are somewhat inelegant-

83. See *Dairen Kisen Kabushiki Kaisha v. Shiang Kee*, [1941] App. Cas. 373 (P.C. 1941) (appeal taken from the Sup. Ct. of H.K.) (involving the liquidation in Hong Kong of the Hong Kong branch of a company incorporated and dissolved in the Republic of China (under § 313(2) of the Companies Ordinance (cap. 32, L.H.K., 1932), re-enacted with minor changes as § 327A of the Companies Ordinance)).

84. Smart, *supra* note 82, at 142. However, a filing under § 327A was fairly recently made in Macau-Mokes Group Ltd., Companies Winding Up No. 62 of 1994 (Feb. 3, 1994).

85. SMART, *supra* note 17, at 68.

86. See *supra* note 68 and accompanying text.

87. SMART, *supra* note 17, at 68.

88. Section 327(1) provides as follows:

Subject to the provisions of this Part [X of the Companies Ordinance], any unregistered company may be wound up under this Ordinance, and all the provisions of this Ordinance with respect to winding up shall apply to an unregistered company, with the exceptions and additions mentioned in this section.

ly drafted, and they overlap and even conflict in scope. Section 327(1) provides that the general winding-up provisions in the Companies Ordinance are subject to the "exceptions and additions" of Section 327; in contrast, Section 331 provides that the winding-up provisions elsewhere in the ordinance are to be supplemented, but not restricted, by the provisions in Part X. These sections should be redrafted to eliminate the overlap and confusion.

The poor drafting of other provisions in Part X of the Companies Ordinance causes ambiguity in resolving even more fundamental issues, notably, the need (1) to resolve the confusing relationship among Sections 326, 327, and 327A and (2) to determine whether these sections are applicable to the winding up of overseas companies. These two issues were only recently resolved in the Hong Kong High Court case, *Securities and Futures Commission v. MKI Corp. Ltd.*,⁸⁹ in which the court held that the power to wind up an unregistered company under Section 327 extends to overseas companies registered under Part XI of the Companies Ordinance.

MKI Corporation Limited ("MKI") was incorporated under the laws of Bermuda. It established a place of business in Hong Kong and registered under Part XI of the Companies Ordinance as an overseas company. Its shares were listed on the Hong Kong Stock Exchange. In 1993, MKI's management entered into deals that led to a decrease in the company's assets from HK\$160.7 million to HK\$7.7 million.⁹⁰ Nevertheless, in the following year, during a one-month period ending on June 5, 1994, MKI's shares doubled in value

Section 331 provides as follows:

The provisions of this Part [X of the Companies Ordinance] with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Ordinance contained with respect to winding up companies by the court, and the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Ordinance:

Provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Ordinance, and then only to the extent provided by this Part [X of the Companies Ordinance].

89. *MKI*, [1995] 2 H.K.C. 79.

90. Ada Yuen, *MKI Corp saved from liquidation*, S. CHINA MORNING POST, Sept. 28, 1995 (Business Post), at 3. In a later decision involving an application in respect of costs, the Hong Kong High Court noted that with respect to MKI's dealings relating to land in China, "either there was deliberate dissipation of the Company's money to persons connected with the management and others or else the management of the Company was so culpably inept that large amounts of money were lost." *Re MKI Corp.*, Companies Winding Up No. 562 of 1994 (October 25, 1995) (unrep.), at 3 [hereinafter *MKI II*].

from HK\$.31 to HK\$.61.⁹¹ The Securities and Futures Commission ("SFC")⁹² quickly intervened and, on June 6, 1994, suspended trading in MKI shares on the ground that the company had issued press releases that they had failed to clear with regulators.⁹³

Suspecting that the directors of MKI had misled its shareholders and committed fraud,⁹⁴ the SFC petitioned to wind up the company,⁹⁵ relying on Section 45 of the Securities and Futures Commission Ordinance.⁹⁶ This was the first time that the SFC petitioned to wind up a listed company in Hong Kong. The SFC asserted that the Hong Kong High Court had the power to wind up MKI under Section 327 of the Companies Ordinance.

MKI disputed this assertion and moved to strike out the petition. It argued that the power to wind up a company under Section 327 is limited to unregistered companies, which are defined in Section 326. Section 326(a) provides that an unregistered company does not include a company registered under the Companies Ordinance.

91. Kerry Wong, *A white knight in sullied armour*, S. CHINA SUNDAY MORNING POST, May 7, 1995 (Money), at 3.

92. The Securities and Futures Commission was established in 1989 to be responsible for a variety of functions with respect to the enforcement of Hong Kong laws that relate to securities, futures contracts, and property investment arrangements. Securities and Futures Commission Ordinance § 4 (cap. 24, L.H.K.) (1995).

93. Wong, *supra* note 91.

94. Bruce Gilley, *Top cadre 'tricked' into joining MKI*, EASTERN EXPRESS, Dec. 15, 1994, at 1. The High Court later noted that MKI:

had been used to dupe the public. The shares had been artificially boosted with false information and at the same time money was at best frittered away in imprudent deals and more likely siphoned out of the Company with unscrupulous deals and all the time the Company was giving the impression it was being run by its directors but in truth and in fact they were acting as fronts for a person who had good reason to distance himself and be seen to distance himself from the Company.

MKI II, *supra* note 90 at 13.

95. The colorful story surrounding MKI also exemplifies the growing ties between Hong Kong companies and Mainland Chinese interests. In November 1994, Yao Mingwei, a son of the retired Chinese Communist Party leader Yao Yilin (or a "Red Prince," as a son of a high ranking Chinese leader is called) became non-executive chairman of MKI. Mr. Yao claims that he was "tricked" into becoming the chairman and that MKI "used him" to get money out of China, but never told him about the background to the company's business. Gilley, *supra* note 94.

96. (Cap. 24, L.H.K.) (1995). This section provides as follows:

If, in the case of a company which may be wound up by the court under the Companies Ordinance (Cap. 32), it appears to the Commission that it is expedient in the public interest that the company should be wound up, the Commission may, subject to subsection (2), present a petition for it to be wound up under that Ordinance on the ground that it is just and equitable that it should be so wound up.

However, MKI argued that Part XI of the Ordinance (unlike corresponding provisions in the United Kingdom legislation) provides that an overseas company *is* registered and, more particularly, that Section 333(3) of the Companies Ordinance “makes clear that a company in respect of which the appropriate steps have been taken is registered.”⁹⁷ Lastly, the company asserted that Section 326(a) makes clear that registration under Part XI is registration under the Companies Ordinance.⁹⁸

The High Court, however, found that MKI had misconstrued the Hong Kong legislation, and it dismissed the company’s application.⁹⁹ The court’s discussion both of the relationship among Sections 326, 327, and 327A of the Companies Ordinance and of the scope of these provisions is instructive. To resolve these issues, the court reviewed the history of the provisions in Part XI of the Companies Ordinance relating to overseas companies. The court noted that provisions requiring overseas companies to register certain documents¹⁰⁰ were enacted in Hong Kong in Ordinance 58 of 1911 (the “Companies Ordinance 1911”), having earlier been enacted in the United Kingdom.¹⁰¹ In 1973, the Companies Law Revision Committee proposed a number of recommendations, including a recommendation that a company should register itself in addition to its documents.¹⁰² This recommendation was finally enacted as part of the 1984 amendments to the Companies Ordinance, and a companies register was established.¹⁰³

The court then turned to the power of the court to wind up an unregistered company under Section 327 of the Companies Ordinance

97. *MKI*, [1995] 2 H.K.C. at 82.

98. *Id.*

99. The High Court had intended to order that MKI be liquidated. However, on September 27, 1995, shareholders avoided liquidation by voting in support of a takeover proposal of the Singapore company, Winfoong Investment (“Winfoong”). Ada Yuen, *supra* note 90. The shareholders preferred Winfoong’s proposal to that of China-backed Wing Hing Holdings. On October 9, 1995, the SFC withdrew its petition. Three days later, when trading in the reconstituted company’s shares was resumed, MKI’s share price soared more than 100%, from HK\$0.80 to HK\$1.68. Lorraine Chan, *MKI soars as trading resumes*, *EASTERN EXPRESS*, Oct. 13, 1995 (Business), at 19.

100. Including the company’s charter, a list of directors, and the name and address of an individual in Hong Kong who was authorized to accept service and notices on behalf of the company. *MKI*, [1995] 2 H.K.C. at 83.

101. *Id.*

102. *Id.* See SECOND REPORT OF THE COMPANIES LAW REVISION COMMITTEE: COMPANY LAW ¶ 10.16, at 297 (April 1973) [hereinafter the 1973 REPORT OF THE COMPANIES LAW REVISION COMMITTEE].

103. See Companies Ordinance § 333(3).

and reviewed the jurisdictional requirements as espoused by English courts under the equivalent United Kingdom provision.¹⁰⁴ The court concluded that companies incorporated overseas may be wound up under the United Kingdom equivalent to Section 327 irrespective of whether the companies have registered documents as overseas companies under United Kingdom law.¹⁰⁵ The court noted that at least prior to the enactment of the 1984 amendments in Hong Kong, the same was true of Hong Kong law.

The court then turned to the effect of the 1984 amendments and considered whether the language in Section 326 "registered . . . under this Ordinance" should be construed as including or excluding companies registered under Part XI of the Companies Ordinance. To gain a better understanding of Section 326, the court first considered the application of Section 327A to companies registered under Part XI. This section provides that the court may wind up a company "which has ceased to carry on business in Hong Kong *notwithstanding* that it has been dissolved or otherwise ceased to exist."¹⁰⁶ The court pointed out that although it may well be the case that a company carrying on business may not have established a place of business in Hong Kong,¹⁰⁷ in practice, a company being wound up pursuant to Section 327A would quite likely be a company that is registered under Part XI of the Companies Ordinance.¹⁰⁸

The court also discussed the origins of Section 327A, noting that the section was enacted in Hong Kong in Ordinance No. 39 of 1932 and was based on earlier enactments in the United Kingdom.¹⁰⁹ The court accepted the reasoning of an earlier English decision that the United Kingdom equivalent of Section 327A "did not confer any

104. *MKI*, [1995] H.K.C. at 84 (1995) (citing *Re A Company* No. 00359 of 1987 Ch. 210 (1988) [hereinafter *Okeanos Maritime Corp.*] (noting "that the jurisdiction to wind up a foreign company is flexible, that there is a sufficiently close connection with the jurisdiction, and that there is a reasonable possibility that creditors will benefit from the winding up")); *Re Real Estate Development Co.*, [1991] B.C.L.C. 210 ("that the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets"). The court also noted that United Kingdom Courts were originally given the power to wind up companies in 1862, but that this power was not extended to Hong Kong until 1911. *Id.* at 83.

105. *Id.* at 83-84. Companies that have not established a place of business may not register documents.

106. *Id.* at 85 (emphasis supplied).

107. See *supra* notes 85-87 and accompanying text.

108. *MKI*, [1995] H.K.C. at 10.

109. *Id.* (citing United Kingdom Companies Act, 1928, 18 & 19 Geo. 5, ch. 45, §91, and United Kingdom Companies Act, 1929, 19 & 20 Geo. 5, ch. 23, §338(2)).

new power to wind up companies.”¹¹⁰ Rather, this section was intended to “remove a doubt as to the court’s jurisdiction which arose in connection with the dissolution of Russian banks following the revolution in 1917.”¹¹¹ The court thus noted that Section 327A “harks back to Section 327(3)(a)”¹¹² and “is predicated upon the basis that there is power to wind up if the company has not been dissolved or otherwise ceased to exist in the country of its incorporation.”¹¹³ Thus, in the court’s view, since oversea companies may be wound up under Section 327A and since the power to wind up foreign companies under Section 327A has its origins in Section 327(3)(a), “the presence of Section 327A alone makes it difficult to construe Section 326 as excluding companies registered under Part XI from inclusion within the meaning of unregistered companies as used in that section. Such a construction would render Section 327A largely ineffective.”¹¹⁴ Furthermore, the court noted that the fact that Section 327A was expressly re-enacted by the 1984 legislation demonstrated that the Hong Kong legislature had not intended that the changes in the registration mechanics for oversea companies was to have any impact on the scope of companies covered by the phrase “a company registered . . . under this Ordinance” in Section 326.¹¹⁵

The court’s interpretation of the relevant statutory language is sound. Moreover, a review of predecessor provisions in the Companies Ordinance 1911¹¹⁶ further assists in interpreting Section 326. The confusing manner in which the term “unregistered company” is defined lies at the heart of the debate about the scope of Section 326(a). As noted above, this section exempts “a company registered . . . under this Ordinance” from the definition of an “unregistered company.” This phrase first appeared in Hong Kong law (in a slightly different form) in Section 245 of the Companies Ordinance 1911. Like Section 2 of the current Companies Ordinance, Section 261 of the 1911 legislation defined the term “company” as a “company formed and registered under this Ordinance or an existing company.”¹¹⁷ Section 1(2), in turn, provided that the 1911 ordi-

110. *Id.*, at 85 (*quoting Re A Company* (No. 007946 of 1993) 1 B.C.L.C. 565, 570 (1994)).

111. *Id.* (*quoting* 1 B.C.L.C. at 570 (1994)).

112. *Id.* at 86.

113. *Id.*

114. *Id.*

115. *Id.*

116. No. 58 of 1911, L.H.K.

117. Companies Ordinance 1911, §261.

nance "applie[d] to every company registered" in Hong Kong¹¹⁸. Part IX of the 1911 legislation dealt with Companies Established Outside the Colony, and Section 252(1) of Part IX included the provision referred to by the *MKI* court that required every company which established a place of business in Hong Kong to register certain documents with the Companies Registrar.¹¹⁹

It is unfortunate that the definition of "unregistered company" in Section 245 of the Companies Ordinance 1911 failed to track the "formed and registered" language in Section 261. However, at that time and until the enactment of the 1984 amendments to Hong Kong companies law, this omission made no difference, because any company registered under Hong Kong companies legislation would also have been formed under Hong Kong companies law; there were no companies that were "registered" but not "formed" under Hong Kong companies law. Thus, the effect of Section 245 of the Companies Ordinance 1911 would have been to exclude Hong Kong companies, that is, companies "formed and registered" under Hong Kong companies law, from the definition of an unregistered company. The same is true of the effect of Section 326(a) the Companies Ordinance, at least until 1984.¹²⁰

With the enactment of the 1984 amendments to Part XI of the Companies Ordinance, the interpretation of Section 326(a) became more complicated. These changes mandated for the first time that an

118. *Id.* at §1(2).

119. The Companies Ordinance 1911 was the first Hong Kong companies ordinance that required foreign companies to register documents. A similar requirement had been enacted in the United Kingdom in the 1907 and 1908 companies legislation. *MKI*, [1995] 2 H.K.C. at 83. Thus, prior to the enactment of § 252(1) in the Companies Ordinance 1911, foreign companies were not required to register any documents with the Hong Kong government.

120. The *MKI* court noted that "the phrase 'registered under this Ordinance' was not and never had been used in respect of Part XI companies." *MKI*, [1995] 2 H.K.C. at 87. That is correct, but there would have been no reason for the issue to have arisen, because Part XI companies were not registered under the Companies Ordinance prior to 1984.

Further support for the interpretation urged above can be gleaned from existing United Kingdom legislation, which reflects the pre-1984 Hong Kong situation in that overseas companies in the United Kingdom continue to register documents rather than the companies themselves. Although the United Kingdom Companies Act, 1985, ch. 6, §735, defines a "company" as a company "formed and registered" under that act, United Kingdom companies are wound up under Part IV of the United Kingdom Insolvency Act, 1986, ch. 45 [hereinafter U.K. Insolvency Act 1986], which is titled "Winding Up Of Companies Registered Under the Companies Acts" (and not "Winding Up Of Companies *Formed* and Registered . . ."). "Unregistered companies" are wound up under Part V of the U.K. Insolvency Act 1986, which is entitled "Winding Up Of Unregistered Companies." It should also be noted that the U.K. Insolvency Act 1986, §220, which defines an "unregistered company", also retains the reference to a company "registered" (rather than "formed and registered") under United Kingdom companies law.

oversea company must register itself, and not just its documents, with the Companies Registrar. The 1984 amendments, however, did not amend the definition of "unregistered company" in Section 326 to track the "formed and registered" language in Section 2 of the Companies Ordinance. This legislative oversight is what led to the dispute in *MKI*, for after 1984 it was possible to have a company that could be "registered," though not "formed," under the Companies Ordinance.

There is no evidence that the enactment of the 1984 amendments to Part XI of the Companies Ordinance was intended to have any effect on the interpretation of the exception contained in Section 326(a). To interpret Section 326(a)'s exemption of "a company registered . . . under this Ordinance" as exempting an "oversea company" registered under Part XI would be inconsistent with the intended application of Section 326(a) and its 1911 predecessor provision, namely, that the exemption of companies "registered" under Hong Kong companies law extends only to companies that are "formed and registered" under the applicable Hong Kong companies ordinance.¹²¹

Thus, one can see from the above analysis and from the opinion of the court in *MKI* that since the exemption in Section 326(a) does not apply to Part XI companies, it is appropriate to wind up oversea companies under Section 327 of the Companies Ordinance. Important policy considerations also support this result. As the *MKI* court noted, acceptance of *MKI*'s argument would have led to the anomaly that a company incorporated overseas that properly registers under Part XI could not be wound up by the Hong Kong courts, but a company incorporated overseas that fails to register or that carries on business in Hong Kong but has not established a place of business there could be wound up.¹²² Such an anomaly would create a big gap in the Hong Kong court's winding-up jurisdiction, because, at present, more than sixty percent of the companies listed on the Hong Kong Stock Exchange are oversea companies.¹²³ This high percent-

121. See the Australian case, *In Re Harry Rickards Tivoli Theatres Ltd.* (1931) V.L.R. 305 (supporting the argument in the text).

122. *MKI*, [1995] H.K.C. at 88.

123. As at the end of March 1995, 327 (61.7%) of the 530 companies listed on the Hong Kong Stock Exchange were overseas companies. SECURITIES AND FUTURES COMMISSION ANNUAL REPORT 1994/1995 § 3, Annex III, at 40 (1995). Both the number and the percentage of oversea companies listed on the Hong Kong Stock Exchange have been increasing. For example, the comparable numbers for earlier years are as follows: as at the end of March 1994, 297 (59.9%) of the 496 companies were oversea companies, SECURITIES AND FUTURES COMMISSION ANNUAL REPORT 1993/94 § 3, Annex III, at 42 (1994); and at

age of oversea companies reflects, in part, the recent trend among Hong Kong companies in favor of redomiciling overseas.¹²⁴

Interestingly, as far back as 1973, the Companies Law Revision Committee proposed that Hong Kong adopt the equivalent of a proposal made by the Jenkins Committee in the United Kingdom, namely, that Hong Kong law be amended to provide expressly that a company incorporated outside Hong Kong could be wound up in Hong Kong if the company had assets in Hong Kong.¹²⁵ This report noted the assertion by the Jenkins Committee that this jurisdiction should exist "irrespective of whether [the foreign company] has had a place of business in Great Britain or has carried on business there so long as one or other of the conditions specified in [the United Kingdom equivalent to Section 327(1)(b) of the Companies Ordinance] is satisfied."¹²⁶ The court in *MKI* noted that such an amendment was unnecessary¹²⁷, but the fact that the issue arose in *MKI* in the context of whether an oversea company could be wound up as an unregistered company demonstrates that such an amendment would have been helpful. Part X of the Companies Ordinance should now be written to incorporate the *MKI* holding in order to avoid further confusion. Section 326(a) should be amended to exclude a company "formed and registered" under the Companies Ordinance from the definition of "unregistered company." For further clarification, the title of Part X of the Companies Ordinance should be amended to refer to foreign companies. A definition of "foreign company" should therefore be included in Part X, either as a subdivision of the definition of "unregistered company" or as a separate term. A jurisdictional test based on the presence of assets should be enacted in Part X, as is mentioned below in Part III.B.2.c.

In addition, Section 327A should be amended or deleted. As

the end of March 1992, 155 (44.4%) of the 349 companies were oversea companies, SECURITIES AND FUTURES COMMISSION ANNUAL REPORT 1991/92 § 5, Annex III, at 54 (1992).

124. See SECURITIES AND FUTURES COMMISSION ANNUAL REPORT 1991/92, *supra* note 123, § 5.31, at 46. As at the end of March 1992, 80 Hong Kong companies had redomiciled overseas. *Id.* § 5, Annex III, at 54. In 1992-93, 12 more companies redomiciled overseas; in 1993-94, 4 companies; and in 1994-95, 1 company. SECURITIES AND FUTURES COMMISSION ANNUAL REPORT 1993/94, *supra* note 123, § 3, Annex II, at 41; SECURITIES AND FUTURES COMMISSION ANNUAL REPORT 1994/95, *supra* note 123, § 3, Annex II, at 39.

125. 1973 REPORT OF THE COMPANIES LAW REVISION COMMITTEE, *supra* note 102, ¶ 10.44, at 306.

126. *Id.* ¶ 10.43, at 306.

127. *MKI*, [1995] 2 H.K.C. at 87-88.

noted above, this section provides that if certain criteria are met, a foreign company "may be wound up as an unregistered company" under Part X of the Companies Ordinance. This phrase "may be wound up as an unregistered company" is a curious one, because it implies that the foreign company may not satisfy the definition of an unregistered company. Yet, as noted by the court in *MKI*, it is clear that Section 327A does not offer an independent basis for winding up a foreign company.¹²⁸ Thus, a company that may be wound up under Section 327A must be an "unregistered company" that may also be wound up under Section 327. Therefore, there is no need to retain Section 327A as an independent provision. Instead, it should be incorporated into a new sub-section in Section 327(3). However, if Section 327A is retained, it should be rewritten as follows:

[Where an unregistered company incorporated outside Hong Kong or a foreign company] which has been carrying on business in Hong Kong ceases to carry on business in Hong Kong, it may be wound up under this section, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the place of its incorporation.

Lastly, as noted earlier, if Section 327A is retained, the section should be retitled, "Foreign companies may be wound up although dissolved."

c. *Jurisdiction*

Except for Section 327A's application to situations where a foreign company "which has been carrying on business in Hong Kong ceases to carry on business in Hong Kong," the Companies Ordinance is silent regarding the jurisdictional connection that must exist between a foreign company and Hong Kong to enable the foreign company to be wound up in Hong Kong. Despite the failure to enact the amendment proposed in 1973 regarding the presence of assets,¹²⁹ it is clear from the case law that a foreign company with assets in Hong Kong may be wound up there.¹³⁰ Over the years, the presence-of-assets test has been modified and now includes the following:

- (1) A proper connection with the jurisdiction must be

128. *MKI*, [1995] H.K.C. at 86.

129. See *supra* notes 125-27 and accompanying text.

130. Hong Kong follows the English position, which has its origins in *Banque des Marchands de Mouscou v. Kindersley*, [1951] Ch. 112. See Smart, *supra* note 82, at 143.

established by sufficient evidence to show (a) that the company has some asset or assets within the jurisdiction, and (b) that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable.¹³¹

- (2) It suffices if the assets of the company within the jurisdiction are of any nature; they need not be "commercial" assets, or assets which indicate that the company formerly carried on business there.¹³²
- (3) The assets need not be assets which will be distributable to creditors by the liquidator in the winding up: it suffices if by the making of the winding up order they will be of benefit to a creditor or creditors in some other way.¹³³
- (4) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding up order, the jurisdiction is excluded.¹³⁴
- (5) The presence of assets includes a right of action that has a reasonable possibility of success.¹³⁵
- (6) The assets upon which to find jurisdiction need not belong to the company, but may belong to an outside source.¹³⁶

The 1985 Hong Kong case of *Re Irish Shipping Ltd.* ("*Irish Shipping*")¹³⁷ further expanded the presence-of-assets test. In this case, the Irish liquidator claimed jurisdiction to wind up an unregistered company under Section 327 of the Companies Ordinance on the basis of the "imminent arrival" in Hong Kong of a ship owned by the unregistered company.¹³⁸ As it so happened, the company had other assets in Hong Kong at the time the winding-up petition was

131. *Re Compania Merabello San Nicholas S.A.*, [1973] Ch. 75, 91-92.

132. *Id.* at 92.

133. *Id.*

134. *Id.*

135. *Re Allobrogia S.S. Corp.*, [1978] 3 All E.R. 423.

136. *Re Eloc Electro-Optieck & Communicatie B.V.*, [1982] Ch. 43. For example, in Hong Kong the assets could include the Protection of Wages on Insolvency Fund, which is administered pursuant to the Protection of Wages on Insolvency Ordinance, cap. 380, L.H.K. (1995).

137. *Irish Shipping Ltd.*, [1985] H.K.L.R. 437.

138. *Id.* at 439.

presented and at the date of the hearing.¹³⁹ Nevertheless, *in obiter*, the court in *Irish Shipping* stated that "the liquidator is not precluded from presenting a petition before the asset is within the jurisdiction. It is sufficient to found jurisdiction if there are assets here when the petition is heard."¹⁴⁰ This assertion is troubling. As Philip Smart states: "Either the court has jurisdiction when the petition is presented or it does not."¹⁴¹ This is surely correct. The date for determining jurisdiction should be the date that the winding-up petition is presented.

Since the decision by the English court in *Okeanos Maritime Corp.*,¹⁴² the existence of an independent assets-based test has been called into question. In this case, the court stated that "provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding-up, the court has jurisdiction to wind up the foreign company."¹⁴³ The court found that a sufficient connection existed because, *inter alia*, the debt owed by the foreign company to the petitioner was incurred in England under an English loan agreement and the foreign company had carried on business in England through its agents.¹⁴⁴ On the basis of the adoption of the "sufficient connection" test in other English cases,¹⁴⁵ some commentators have argued that the presence of assets might be regarded as a factor to be considered under a "sufficient connection" analysis.¹⁴⁶ The Law Reform Commission also sets forth this interpretation in its Report on Bankruptcy.¹⁴⁷

The Hong Kong courts have only recently begun to address the "sufficient connection" test. In *MKI*, the High Court briefly noted the

139. *Id.* at 444.

140. *Id.*

141. SMART, *supra* note 17, at 62 n.14. See also Smart, *supra* note 82, at 143-44; *Re Real Estate Development Co.* [1991] B.C.L.C. at 217 (stating that "it seems ... to be necessary, where there is no asset within the jurisdiction at the presentation of a petition, to establish a link of genuine substance between the company and this country").

142. *Re A Company* (No. 00359 of 1987) Ch. 210 (1988).

143. *Id.* at 225-26.

144. *Id.* at 226.

145. See *Re A Company* (No. 003102 of 1991), *Ex parte Nyckeln Finance Co.* [1991] B.C.L.C. 539, 540 (finding a sufficient connection); *Re Real Estate Development Co.* [1991] B.C.L.C. at 217 (not finding a sufficient connection and also requiring that the court be able to exercise jurisdiction over one or more persons who will benefit from the making of the winding up order).

146. See 2 DICEY & MORRIS, *supra* note 23, Comment to Rule 157, at 1121-23, SECOND SUPPLEMENT, *supra* note 26, at 96-97.

147. See REPORT ON BANKRUPTCY, *supra* note 4, ¶ 2.40, at 30.

applicability of the test but offered no concrete analysis as to the factors at bar that would have satisfied the test.¹⁴⁸ The discussion in *Re China Tianjin International Economic and Technical Co-operative Corp.*¹⁴⁹ ("CTIETCC") was more detailed.¹⁵⁰ In deciding to exercise its winding-up jurisdiction, the court noted the principle from *Okeanos Maritime Corp.* that the "jurisdiction to wind-up a foreign company is flexible" and repeated the requirements that "there is a sufficiently close connection with the jurisdiction and that there is a reasonable possibility of benefit for the creditors from the winding up."¹⁵¹ Among the factors discussed by the court were the following: that the China Tianjin International Economic and Technical Co-operative Corp. ("CTIETCC") had one share in the Hong Kong company Tsinlien Economic Cooperation Co. Ltd. and that CTIETCC claimed in some published materials to have set up its own office or offices in Hong Kong and to have established throughout the world, including in Hong Kong, more than "twenty joint-ventures, cooperative business operations, and enterprises with exclusive Chinese investment."¹⁵² Before making the winding-up order, the court noted that the existence of these factors gave rise to the "prima facie presumption" that CTIETCC had assets in Hong Kong and that "there must . . . be a reasonable prospect of there being substantial assets which are liable to be recovered should a

148. *MKI*, [1995] 2 H.K.C. at 84 (also noting the requirement of *Re Real Estate Development Co.*, [1991] B.C.L.C. at 210, "that the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets").

149. *Re China Tianjin International Economic and Technical Co-operative Corp.* [1994] 2 H.K.L.R. 327 [hereinafter *CTIETCC*].

150. This case involved a petition brought under Section 327 of the Companies Ordinance to wind up a Chinese state enterprise, China Tianjin International Economic and Technical Cooperative Corp. ("CTIETCC"), a company established pursuant to an Order of the Ministry of Foreign Trade and Economic Cooperation and the People's Government of the Municipality of Tianjin. The petitioner was an English creditor, Zoneheath Associates Ltd. ("Zoneheath"), which petitioned in Hong Kong on the ground that CTIETCC was unable to pay its debts, as it had failed to pay the petitioner's U.S. \$4.6 million debt that was based on a default judgment that had been entered in the Queen's Bench Division in England in 1992 and later registered in Hong Kong. 2 H.K.L.R. at 328. Zoneheath decided to petition to wind up CTIETCC in Hong Kong only after failing to locate assets belonging to CTIETCC in the United Kingdom that could be used to satisfy the English judgment. *PRC State-Owned Company to Liquidate in Hong Kong*, H.K. LAW., Feb. 1995, at 8. It is claimed that Zoneheath chose Hong Kong as the winding-up forum after discovering that CTIETCC's own literature stated that the company had a share in a Hong Kong company. *Id.*

151. *CTIETCC* [1994] 2 H.K.L.R. at 328 (also noting the requirement from *Re Real Estate Development Co.* [1991] B.C.L.C. 210 "that the court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets").

152. *Id.* (emphasis in original).

winding-up order be made.”¹⁵³

It can be seen from the court's analysis in *CTIETCC* that the court adopts the view that the presence of assets should be a factor taken into consideration under the sufficient connection test. The gaining popularity of the sufficient connection test is worrisome, because it has the potential to lead to unnecessary confusion in determining whether there is proper jurisdiction to liquidate a foreign company. Jurisdictional factors should be clear cut to make it easier for creditors, foreign representatives, and foreign companies to understand under what conditions a foreign company may be wound-up in Hong Kong. Philip Smart espouses similar concerns in his criticism of the vagueness of the sufficient connection test.¹⁵⁴ He rightly proposes that there should be two independent jurisdictional tests: one based on the presence of assets and another based on the carrying on of business “either directly or through an agent.”¹⁵⁵ These tests should be incorporated into Part X of the Companies Ordinance. The variety of other factors that the courts currently discuss under a sufficient connection test should relate to the discretion of the court when determining whether to exercise its jurisdiction.

Okeanos Maritime Corp. also provides that when a court is deciding whether jurisdiction exists, “[i]t is also appropriate for the court to consider whether any other jurisdiction is more appropriate for the winding up”¹⁵⁶ This test was adopted by the court in *Ex parte Nyckeln Finance Co.*¹⁵⁷ and by the Law Reform Commission in its Report on Bankruptcy.¹⁵⁸ Nevertheless, as has been noted in a later case¹⁵⁹ and by some commentators,¹⁶⁰ courts should consider this factor only when exercising their discretion. To hold otherwise would make it impossible for the Hong Kong courts to order an ancillary or concurrent winding up in Hong Kong¹⁶¹ that

153. *Id.*

154. SMART, *supra* note 17, at 64-65.

155. *Id.* at 65 (also rightly retaining the requirement “that there is a reasonable possibility of benefit accruing to creditors from the making of a winding up order”).

156. *Okeanos Maritime Corp.* [1995] Ch. at 226.

157. *Nyckeln Finance*, [1991] B.C.L.C. at 540.

158. REPORT ON BANKRUPTCY, *supra* note 4, ¶ 2.40, at 30.

159. *Re Wallace Smith & Co.* 1992 B.C.L.C. 970, 985.

160. Smart, *supra* note 17, at 64, n.5; 2 DICEY & MORRIS, *supra* note 23, Comment to Rule 157, at 1123; and SECOND SUPPLEMENT, *supra* note 26, at 96-97.

161. See *Re Wallace Smith & Co.* [1992] B.C.L.C. at 985. For a discussion of ancillary and concurrent liquidations, see *infra* Part II.B.2.d.

would enable a foreign company's general creditors to reach the foreign company's assets in Hong Kong.

d. Discretion to Order Relief and the Types of Relief

Satisfaction of the jurisdictional criteria does not necessarily lead a court to make a winding-up order. Pursuant to the court's inherent jurisdiction and to Section 180 of the Companies Ordinance, the court has the discretion to dismiss a winding-up petition and thereby not make a winding-up order.¹⁶² Before a court decides to make a winding-up order, the court should consider, as noted by the court in *Okeanos Maritime Corp.*, whether it is more appropriate for the winding-up to occur elsewhere.¹⁶³ Consideration of this factor is especially important in those instances in which the underlying dispute between a foreign company and its petitioner does not involve Hong Kong and in which the foreign company has not been wound up elsewhere. This was the very fact situation that arose in the recent liquidation of CTIETCC. Surprisingly, the company failed to raise this issue. One would have thought that CTIETCC would have argued, first, that the proper place to wind up CTIETCC was in China—the company's place of incorporation and principal place of business—rather than in Hong Kong and, second, that it was improper for the petitioner to try to enforce its judgment by petitioning for the company's liquidation in Hong Kong when other remedies were available.¹⁶⁴

More frequent than the *CTIETCC* situation, however, are cases in which a foreign representative petitions in Hong Kong to wind up the foreign company, or the estate of the foreign company, that she

162. Under § 209 of the Companies Ordinance, the court also has the discretion to stay winding up proceedings at any time after the winding up order has been made. Furthermore, in the recent case of *Bicoastal Corp. v. Shinwa Co.*, [1994] 1 H.K.L.R. 65, a Hong Kong court took the unusual action of staying winding up proceedings before a winding up order had even been made.

163. *Okeanos Maritime Corp.* [1988] Ch. at 226. See *supra* notes 156-60 and accompanying text.

164. Regarding the first point, the petitioner could have stated that it had not attempted to enforce its judgment in China—either by relying on China's law of civil procedure or by commencing a liquidation of CTIETCC under Chinese insolvency law—because it doubted that its claim would have received just treatment in the Chinese courts, and it therefore believed that no benefits would have resulted from pursuing either strategy. See, e.g., *infra* Part IV.C. It could also have argued that these concerns justified the application of the principle that there are times when it is inappropriate to require a liquidation of a company in its place of incorporation. Regarding the second point, the petitioner could have noted that it commenced a liquidation to benefit from the liquidator's investigatory powers which it deemed essential for tracking down CTIETCC's assets in Hong Kong. Had these arguments been put forth, they would have made for a very interesting decision.

represents abroad. In such cases, the Hong Kong court often focuses, not on whether a winding-up order should be made, but rather on the type of cooperation that the Hong Kong court should provide to the foreign liquidation in the concurrent insolvency proceeding in Hong Kong. The court can adopt a very cooperative attitude and order an ancillary winding up, as did the court in *Irish Shipping* when it stated: "The jurisdiction of this court in the liquidation [will] be ancillary as far as possible to the winding-up in Ireland and [will] provide assistance to the official liquidator in the collection and preservation of the assets within Hong Kong."¹⁶⁵

In an ancillary winding up under Hong Kong law, the primary aim of the Hong Kong proceeding is to assist the foreign proceeding.¹⁶⁶ *Irish Shipping* is the only reported Hong Kong case that discusses the common law conditions that must be satisfied before an ancillary winding-up order may be made. First, creditors who oppose the making of a winding-up order must give "satisfactory reasons" to support their position.¹⁶⁷ Second, the court should consider the interests of unsecured creditors (e.g., equality of distribution) and of the public.¹⁶⁸ Third, the court should consider the "comity of nations whereby it is desirable that the court should assist the liquidator in another jurisdiction to carry out his duties unless good reasons to the contrary have been put forward."¹⁶⁹

Although not addressed by the court in *Irish Shipping*, "good reasons to the contrary" would arise in a case in which the connections between the foreign company and the country in which the primary liquidation occurs are not substantial enough to justify the granting of ancillary assistance by the Hong Kong court. In such a case, it would be more appropriate for the Hong Kong court to order a concurrent liquidation in which the Hong Kong liquidator and foreign representative would act on equal footing. One possibility would be for all local assets to be distributed to creditors in a full-

165. *Irish Shipping Ltd.*, [1985] H.K.L.R. at 445.

166. A liquidator is appointed, a stay comes into effect, and the Hong Kong avoidance powers are applicable. The Hong Kong court may also order that the foreign company's assets in Hong Kong be turned over to the foreign liquidator to be distributed in the foreign proceeding. See, e.g., *Re Irish Shipping, Companies Winding Up No. 408 of 1984, Order* (1985). If a turnover order is made, the Hong Kong court would most likely require that the costs of liquidation, priorities (called preferential debts in Hong Kong), and secured creditors' claims be satisfied before sending the surplus abroad. See Smart, *supra* note 17, at 248-50.

167. 1985 H.K.L.R. at 444.

168. *Id.*

169. *Id.* at 445. Cf. Smart, *supra* note 17, at 236-37 (proposing a more general test of whether ordering an ancillary winding up would be in "the interests of all the parties").

scale liquidation in Hong Kong. Another possibility would be for the Hong Kong liquidator and the foreign representative to agree upon a scheme of arrangement regarding distributions to creditors worldwide. Such a scheme would require the approval of the Hong Kong court and compliance with the law of the jurisdiction in which the debtor is incorporated.¹⁷⁰ Cooperation might also be achieved among concurrent insolvencies of various members of one corporate family when the representatives of the respective debtors negotiate settlement agreements, as occurred in the insolvency proceedings involving the Deak-Perera group of companies.¹⁷¹

Since Hong Kong law does not provide for the application of foreign insolvency law in ancillary liquidation proceedings, it does not allow for the development of what may be called the universality/unity approach. However, cross-border cooperation is still possible under what may best be characterized as a universality/plurality approach—through either an ancillary winding-up or a concurrent insolvency. Additional provisions should be enacted that include criteria for courts to consider when deciding whether to grant ancillary assistance to foreign liquidations, as well as examples of the types of assistance that may be granted. Section 304 of the U.S. Bankruptcy Code might prove helpful in this respect (as the Subcommittee of Insolvency has noted).¹⁷²

3. Bankruptcy

a. Introduction

Since Hong Kong courts do not recognize the principle of the “unity of bankruptcy,” Hong Kong courts have jurisdiction to adjudge a debtor bankrupt in Hong Kong even though the debtor has already been adjudicated bankrupt abroad.¹⁷³ However, since a vesting order operates to vest movable property in Hong Kong in the foreign trustee (provided the foreign law extends to movable property in Hong Kong),¹⁷⁴ a foreign trustee will often not need to commence

170. See Smart, *supra* note 17, at 214-15.

171. See *R. Leslie Deak v. Deak Perera Far East Ltd. (in liq.)* [1991] 1 H.K.L.R. 551, 555; *Deak Perera (Far East) Ltd. (in liq.) v. R. Leslie Deak* [1995] 1 H.K.L.R. 145. For a discussion of these cases, see Booth, *supra* note *, at 44-47.

172. CORPORATE RESCUE AND INSOLVENT TRADING CONSULTATION PAPER, *supra* note 5, ¶ 1.40 at 15.

173. 2 DICEY AND MORRIS, *supra* note 23, Rule 163 & accompanying Comment, at 1161-62.

174. See *supra* notes 47-49.

a bankruptcy against a foreign debtor to reach movable property. The same is true in cases involving immovable property, because a foreign trustee may be able to be appointed as receiver of the debtor's immovable property in Hong Kong.¹⁷⁵

Nevertheless, situations might arise in which it would be advantageous to commence a bankruptcy proceeding against a foreign debtor. For example, a foreign representative may want (1) to reach immovable property not otherwise obtainable, (2) to avoid uncompleted attachments or executions,¹⁷⁶ certain settlements,¹⁷⁷ or fraudulent preferences,¹⁷⁸ (3) to gain the application of broad investigatory powers,¹⁷⁹ or (4) to benefit from the stay.¹⁸⁰ (However, as in liquidation, the stay does not prevent secured creditors from realizing or otherwise dealing with their security).¹⁸¹ Commencement of a bankruptcy proceeding would also allow creditors to benefit from the relation back doctrine.¹⁸²

Hong Kong bankruptcy law still adopts the notion that before a bankruptcy proceeding may be commenced, a debtor must first commit an "act of bankruptcy."¹⁸³ This notion is premised on the belief that certain types of wrongful conduct by the debtor (e.g., unjustly defeating or delaying one's creditors), rather than the debtor's mere "financial embarrassment," should trigger a bankruptcy proceeding.¹⁸⁴ The Law Reform Commission has proposed to abolish the concept of "acts of bankruptcy" and to replace it with

175. See *supra* note 52. When seeking such relief, the foreign representative should file an application for an order in aid.

176. Bankruptcy Ordinance § 45.

177. *Id.* § 47.

178. *Id.* § 49. As in corporate insolvencies, the relevant period is six months.

179. *Id.* § 29.

180. After the presentation of a bankruptcy petition, but before the making of a receiving order, the court *may* stay any action, execution, or other legal process. *Id.* § 14. After the making of a receiving order, no creditor with a provable debt in the debtor's bankruptcy shall have any remedy against the debtor or the debtor's property in respect of the debt, or shall commence any action or other legal proceeding, except by leave of the court. *Id.* § 12(1).

181. See *id.* § 12(2).

182. *Id.* § 42. This doctrine "provides for the 'relation back' of the trustee's title to property of the bankrupt to the time of the act of bankruptcy on which a receiving order is made, or, if there has been more than one act of bankruptcy, the time of the first of these acts within the three months before the presentation of the bankruptcy petition." REPORT ON BANKRUPTCY, *supra* note 4, ¶14.1, at 133. See also *id.*, ch. 14, at 133-37.

183. Bankruptcy Ordinance § 3(1). The act of bankruptcy upon which the petition is grounded must occur within three months of the filing of the petition. *Id.* § 6(c).

184. DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS AND MATERIALS ON BANKRUPTCY 27 (2d ed. 1990).

other grounds.¹⁸⁵

Current Hong Kong law explicitly provides for a bankruptcy petition to be filed by either a creditor or the debtor.¹⁸⁶ Thus, like the Companies Ordinance, the Bankruptcy Ordinance fails to expressly provide for the filing of a petition by a foreign representative. Nevertheless, a foreign representative may commence a bankruptcy case against the person whose estate she represents abroad. According to the Official Receiver¹⁸⁷, the practice in Hong Kong is to permit a foreign trustee to file a petition as a creditor of the foreign debtor.¹⁸⁸ At present, a foreign representative may therefore commence a bankruptcy against a foreign debtor as a creditor of the debtor, or she may convince a creditor or the debtor himself to file the petition. The Bankruptcy Ordinance should be amended to authorize explicitly a foreign representative to commence a bankruptcy against the individual whose estate she represents in the foreign proceeding.

The Official Receiver plays a major role in bankruptcy cases, and the Law Reform Commission has proposed that this role be increased.¹⁸⁹ If the court makes a receiving order to protect the estate,¹⁹⁰ the Official Receiver becomes the receiver of the debtor's property,¹⁹¹ and, if an adjudication order is made¹⁹² (which occurs

185. See REPORT ON BANKRUPTCY, *supra* note 4, ch. 1, at 6-19. The four grounds are the following: (1) the failure of a debtor to comply with the terms of a bankruptcy notice; (2) the unsatisfied execution of a judgment against the property of a debtor; (3) the departure, or intention to depart, out of Hong Kong by a debtor knowing that a necessary consequence of his departure would be to defeat or delay his creditors, notwithstanding that his absence from Hong Kong had nothing to do with his debts; and (4) the default by a debtor under a form of voluntary arrangement.

186. Bankruptcy Ordinance §§ 9-10.

187. The Official Receiver's Office is responsible for the administration of insolvency matters that involve the compulsory winding up of companies and the bankruptcy of individuals or partnerships. OFFICIAL RECEIVER'S OFFICE ANNUAL DEPARTMENTAL REPORT 1994-95, ¶1.1, at 1 (Hong Kong 1995) [hereinafter OFFICIAL RECEIVER'S 1994-95 REPORT].

188. There is conflicting case law regarding the ability of a trustee to file a bankruptcy petition as a creditor of the debtor. See *Hutcheson v. Taylor* [1931] Scots. L. Times 356, 360-61 (supporting the proposition). But see the Canadian case, *Re Eades Estate* [1917] W.W.R. 65, 90 (rejecting the proposition).

189. See, e.g., REPORT ON BANKRUPTCY, *supra* note 4, ¶¶ 8.7-8.11, at 69-70. For a criticism of these proposals, see *infra* Part V.C.3.

190. See Bankruptcy Ordinance § 5.

191. *Id.* § 12(1). Also, the court may appoint the Official Receiver to be interim receiver of the debtor's property at any time after the presentation of the petition and before the making of a receiving order. *Id.* § 13.

192. *Id.* § 22.

in the majority of cases),¹⁹³ the Official Receiver is usually chosen by the creditors to serve as the trustee.¹⁹⁴

b. Jurisdiction

In a bankruptcy case, jurisdiction must exist at the time of the occurrence of any act of bankruptcy. In the case of a creditor's petition, jurisdiction must also exist at the time that (or within a year before the date on which) the bankruptcy petition is filed. Section 3(2) of the Bankruptcy Ordinance provides that "a debtor":

includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—

- (a) was personally present in Hong Kong; or
- (b) ordinarily resided or had a place of residence in Hong Kong; or
- (c) was carrying on business in Hong Kong, personally or by means of an agent or manager; or
- (d) was a member of a firm or partnership which carried on business in Hong Kong.

Section 6(1), in turn, provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless:

- (d) the debtor is domiciled in Hong Kong, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in Hong Kong, or has carried on business in Hong Kong, personally or by means of an agent or manager, or is or within the said period has been a member of a firm or partnership of persons which has carried on business in Hong Kong by

193. REPORT ON BANKRUPTCY, *supra* note 4, ¶ 5.8, at 42. See also *id.* ¶ 6.2, at 46. For example, of the 294 bankruptcy cases in 1991-92 in which a receiving order was made, an adjudication order followed in 212 cases. ANNUAL DEPARTMENTAL REPORT OF THE HONG KONG REGISTRAR GENERAL, 1991-92 ¶ 108, at 40 [hereinafter REGISTRAR GENERAL'S 1991-92 REPORT].

194. For example, between 1959 and 1992, there were only four cases in which the Official Receiver has not been appointed trustee. REGISTRAR GENERAL'S 1991-92 REPORT, *supra* note 193, ¶ 108, at 40. Under the recent proposals of the Law Reform Commission, the Official Receiver will be even more likely to be the trustee. Under these proposals the two-step bankruptcy procedure comprised of the receiving order and the adjudication order will be replaced by a one-step process comprised of a bankruptcy order only and the Official Receiver will have the discretion whether to serve as the trustee. See REPORT ON BANKRUPTCY, *supra* note 4, ch. 5, at 41-45, ch. 8, at 67-72.

means of a partner or partners or an agent or manager.

The Law Reform Commission has recommended that the current jurisdictional criteria be replaced by a Hong Kong version of Section 265 of the U.K. Insolvency Act 1986. The new version is as follows:

- (1) A bankruptcy petition shall not be presented to the court . . . unless the debtor, irrespective of nationality¹⁹⁵
 - (a) is domiciled in Hong Kong,
 - (b) is personally present in Hong Kong on the day on which the petition is presented, or
 - (c) at any time in the period of three years ending with that day—
 - (i) has been ordinarily resident, or has had a place of residence, in Hong Kong, or
 - (ii) has carried on business in Hong Kong (as interpreted by Section 265(2) of the U.K. Insolvency Act 1986).¹⁹⁶

There were differences of opinion between the Subcommittee on Insolvency and the Law Reform Commission regarding whether the presence of assets should be an additional jurisdictional criterion.¹⁹⁷ The Subcommittee proposed its inclusion and recommended that jurisdiction should exist when the debtor has, will have, or is likely to have, assets within Hong Kong by the time the bankruptcy order is made.¹⁹⁸ The Law Reform Commission rightly noted that it would be unworkable to confer jurisdiction prospectively at the time the court hears the petition and decides whether to make a bankruptcy petition.¹⁹⁹ Unfortunately, the Law Reform Commission was also critical of basing jurisdiction on the presence of assets at the time of the filing of a bankruptcy petition. To use the Commission's own words:

195. The phrase "irrespective of nationality" does not appear in the United Kingdom legislation. Its addition is intended to clarify, rather than change, the current position. *See* REPORT ON BANKRUPTCY, *supra* note 4, ¶¶ 2.8-2.11, at 22-23.

196. *Id.* ¶ 2.11 at 23.

197. There were also disagreements about the Subcommittee's proposal that a further independent ground should be whether "there was the possibility of a benefit accruing to a creditor or creditors by the making of the order." *Id.* ¶ 2.37, at 29. The Law Reform Commission correctly rejected this proposal. *See id.* ¶¶ 2.38-42, at 29-31.

198. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 2, ¶ 3.12, at 19.

199. REPORT ON BANKRUPTCY, *supra* note 4, ¶ 2.29, at 27, ¶¶ 2.34-35, at 28. *See also supra* text accompanying notes 138-141.

it is fair to say that the proposal has not been adopted more because of difficulties in putting it into effect (illustrated, for example, by the probability that it could create difficulties for the Hong Kong courts in applying extra-territorial jurisdiction) rather than out of sympathy for a debtor whose only connection with Hong Kong was to place assets here.²⁰⁰

The Commission also stated that a jurisdictional ground based on the presence of assets "would go far beyond any recognised basis for jurisdiction to be exercised by Hong Kong courts in accordance with established conflict of law principles and with international comity."²⁰¹ Moreover, the Commission noted that if an assets-based test were enacted, no other connection between the debtor and Hong Kong would be required, and, as a result, "foreign courts are likely to perceive the jurisdiction as unreasonable and to refuse judicial recognition and support."²⁰²

The Law Reform Commission's concerns are misguided for a number of reasons. First, the notion of basing bankruptcy jurisdiction on the presence of assets is not as radical as the Law Reform Commission suggests. United States law has for many years included such a jurisdictional ground—previously in the U.S. Bankruptcy Act²⁰³ and currently in the U.S. Bankruptcy Code²⁰⁴—without adverse consequences.

Second, the Law Reform Commission's concerns to the contrary, an assets-based test would most likely foster, not hinder, cross-border cooperation. In its discussion of an assets-based test, the Law Reform commission focused on the possible negative ramifications that adoption of the test could have on foreign treatment of Hong Kong bankruptcies. In so doing, the Commission failed to see that the inclusion of the test would make it easier for Hong Kong courts to assist foreign bankruptcies. A possible reason for the Commission's errant focus was its failure to see that the petitioner most likely to rely on the new jurisdictional ground would be a foreign representative seeking the assistance of the Hong Kong courts with respect

200. *Id.* ¶ 2.19, at 25.

201. *Id.* ¶ 2.29, at 27.

202. *Id.* ¶ 2.33, at 28.

203. U.S. Bankruptcy Act of 1898, ch. 541, § 2(a)(1).

204. 11 U.S.C.A. § 109(a) (West 1995).

to a foreign debtor's Hong Kong assets.²⁰⁵

Third, the Law Reform Commission failed to consider that a court would have had the discretion not to order relief in a case commenced on the basis of the presence of assets in Hong Kong.²⁰⁶ Thus, the enactment of this additional jurisdictional criterion would not necessarily have led to bankruptcy orders being made in all cases based on the presence of assets.

Fourth, the Law Reform Commission has raised certain objections to the presence-of-assets test without acknowledging that these same concerns equally apply to other jurisdictional criteria. For example, the Law Reform Commission asserts that a presence-of-assets test might lead to a "tenuous basis for the exercise of jurisdiction [that] would probably not be accepted by the Hong Kong court in its general civil jurisdiction" because the "transaction and the debt underlying the petition . . . need have no connection whatever with Hong Kong."²⁰⁷ However, this assertion is equally true of possible cases that could be based on the personal presence test. For example, non-Hong Kong creditors could theoretically petition for the bankruptcy of a first-time tourist to Hong Kong, or even of a passenger who is stranded overnight in Hong Kong when engine difficulties force his plane to make an unscheduled stop. Thus, depending on the facts of a given case, an assets-based jurisdictional test may yield no more tenuous a connection with Hong Kong than do other jurisdictional criteria such as personal presence or any of the proposed (as well as existing) jurisdictional criteria that may be satisfied before the date of the filing of the petition.²⁰⁸ Moreover, the assertion of the Law Reform Commission that in cases based on the presence of assets "foreign courts are likely to perceive the jurisdiction as

205. As discussed above, movable assets that have not been attached or charged will vest in a foreign trustee pursuant to a foreign vesting order. Therefore, it will be rare for a foreign trustee to commence bankruptcy proceedings in Hong Kong against a foreign debtor whose estate she represents abroad. A foreign representative will commence a bankruptcy case in Hong Kong primarily to reach assets that are otherwise unobtainable. *See supra* notes 173-78 and accompanying text. In such cases, the Hong Kong proceeding would function as a secondary or concurrent bankruptcy, perhaps in an ancillary capacity, primarily to adjudicate claims to those assets that would otherwise be outside the reach of the foreign representative.

206. *See infra* part II.B.3.(c).

207. REPORT ON BANKRUPTCY, *supra* note 4, ¶ 2.33, at 28.

208. A likely response by the Law Reform Commission that can be gleaned from the Report on Bankruptcy would be that in the two examples in the text above there is at least a "personal connection between the debtor and Hong Kong." REPORT ON BANKRUPTCY, ¶2.32, at 28.

unreasonable and to refuse judicial recognition and support"²⁰⁹ is equally true of cases based on these other factors.²¹⁰ In such cases, it would be best for a primary bankruptcy to be commenced abroad in the jurisdiction in which the foreign debtor is domiciled or resides, and for the Hong Kong court to offer its assistance and cooperation in facilitating the worldwide distribution of the debtor's assets.²¹¹

Finally, the failure to include an assets-based jurisdictional ground actually leaves a gap in the existing law: certain assets might be outside the reach of the foreign trustee, yet also outside the scope of Hong Kong bankruptcy law. This gap may well work to the advantage of fast-moving creditors and to the detriment of unsecured creditors generally.²¹² This is a very unsatisfactory result.

Perhaps the Law Reform Commission will reconsider its decision to omit the presence of assets as a jurisdictional criterion.

c. Discretion to Order Relief and the Types of Relief

Under its inherent jurisdiction, the court has the discretion to dismiss any bankruptcy petition and, under Section 9(3) of the Bankruptcy Ordinance, the discretion to dismiss a creditor's petition. The court also has the discretion under Section 10(1) of the Bankruptcy Ordinance not to make a receiving order in a case commenced by a debtor's petition, under Section 100(2) to adjourn any proceedings before it, and under Section 104 to stay bankruptcy proceedings permanently or for a limited time. The power to stay proceedings is rarely exercised.²¹³ When a bankruptcy petition is filed in Hong Kong against a debtor who has previously been adjudicated bankrupt abroad, the more likely scenario is for a concurrent bankruptcy to occur in Hong Kong. The Hong Kong court may then choose among the following: entering a turnover order, settling all claims in the Hong Kong proceeding, or approving a scheme of arrangement agreed

209. *Id.* ¶2.33, at 28.

210. The same is true of a case based on the ground of a debtor's departure from Hong Kong.

211. For further discussion, see Booth, *supra* note *, at 78-79.

212. For example, assume that a fast-moving creditor attaches a foreign debtor's asset in Hong Kong before that asset vests in a foreign trustee who is appointed trustee of the foreign debtor's estate. Also assume that the attachment would be avoidable under Hong Kong bankruptcy law. The foreign representative would be unable to claim the asset, and, under the Law Reform Commission's proposals, if none of the proposed jurisdictional criteria for petitioning for bankruptcy could be satisfied, the fast-moving creditor would also be immune from possible attack in a Hong Kong bankruptcy proceeding. The same result would occur in a case in which the foreign bankruptcy law was territorial in scope and did not extend to the Hong Kong asset.

213. SMART, *supra* note 17, at 34, 43-55.

upon by the Hong Kong bankruptcy trustee and the foreign representative for a pooling of the debtor's assets and a pro rata distribution among creditors.²¹⁴ In concurrent bankruptcies, as in concurrent and ancillary liquidations, Hong Kong adopts the universality/plurality approach. The current situation would be improved, however, if statutory criteria were enacted to assist courts in deciding how best to cooperate with foreign bankruptcies. These new provisions should explicitly provide that ancillary relief may be granted.

IV. THE TREATMENT OF HONG KONG INSOLVENCIES BY COURTS IN ENGLAND, THE UNITED STATES, AND CHINA²¹⁵

Hong Kong law provides that the title of a bankruptcy trustee extends to property abroad²¹⁶ and that a trustee may seek judicial assistance abroad with respect to a Hong Kong bankruptcy. Similarly, Hong Kong law provides that a liquidator may seek judicial assistance abroad with respect to a company being wound up in Hong Kong.²¹⁷ Since Hong Kong is not a party to any transnational insolvency treaties, the question of whether a foreign court will recognize a Hong Kong insolvency and provide assistance must be resolved by the law of the foreign jurisdiction. Following is a brief summary of the positions of English, United States, and Chinese law regarding these issues. These summaries are included to demonstrate some of the various ways in which foreign countries currently treat Hong Kong insolvencies. Part V below, in turn, discusses developments in Hong Kong and China that will affect whether foreign countries will continue to recognize, and offer assistance to, Hong Kong insolvencies.

A. *English Law*

Although Hong Kong and England do not have a reciprocal agreement, England has unilaterally provided for the recognition of Hong Kong insolvencies through the enactment of Section 426(4) of the U.K. Insolvency Act 1986 (co-operation between courts exercising jurisdiction in relation to insolvency). Section 426(4) states that "[t]he courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the

214. *See id.* at 214-15, 220.

215. This section has been condensed from Booth, *supra* note *, at 58-74.

216. Bankruptcy Ordinance §§ 2, 43(i), 58.

217. *American Express Int'l Banking Corp. v. Johnson* [1984] H.K.L.R. 372.

corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory."²¹⁸ Section 426(11)(b) of the U.K. Insolvency Act 1986, in turn, specifies that "relevant country or territory means any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument."²¹⁹ In 1986, the Secretary of State of England specified that Hong Kong is a relevant territory.²²⁰ Thus, in a case involving a request made to a court in the United Kingdom by a Hong Kong liquidator or trustee, the United Kingdom court "shall" assist the Hong Kong court.²²¹ It is hoped that Hong Kong will remain a relevant territory after 1997.

B. *United States Law*²²²

The U.S. Bankruptcy Code expressly provides the following three options for a foreign representative who wants a U.S. court to recognize, and provide assistance to, a foreign insolvency, including the following: (1) filing a petition under Section 303(b)(4) to commence an involuntary Chapter 7 (liquidation) or Chapter 11 (reorganization) case against a foreign debtor; (2) filing a petition under Section 304 to commence a case ancillary to a foreign proceeding; and (3) seeking dismissal of a case or suspension of all proceedings under Section 305(a)(2). A recent case demonstrates that a foreign representative may also file a petition on behalf of a debtor under Section 301 to commence a voluntary case under Chapter 7 or Chapter 11.²²³ In addition, the foreign representative may recover assets or vacate local attachments under state law by seeking the granting of comity.

In most cases, the foreign representative's choice will be

218. U.K. Insolvency Act 1986 § 426(4). For further analysis of § 426, see SMART, *supra* note 17, at 259-64. See also FLETCHER, *supra* note 25.

219. U.K. Insolvency Act 1986 § 426(11)(b).

220. United Kingdom Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order (No. 2123) (1986).

221. An example of such assistance is a 1992 case in which the English High Court of Justice, Chancery Division, granted the relief requested by the Hong Kong Official Receiver under § 426, namely, the appointment of the Official Receiver as receiver of a Hong Kong bankrupt's real property in England, with the power to sell and deal with the proceeds of sale. *Official Receiver of Hong Kong v. Keith Thomas Philcox*, Ch. 1992 O. 6052, (Order, High Court of Justice, Chancery Division, Aug. 13, 1992).

222. For a detailed discussion of the issues summarized below, see Charles D. Booth, *supra* note 15.

223. See *In re Maruko, Inc.* No. SD 91-12303-A11 (Bankr. S.D. Cal. Oct. 30, 1991)

between the first two options above—petitioning for a liquidation under U.S. law or petitioning for ancillary assistance. In a liquidation commenced under Section 303(b)(4) or Section 301, a trustee is appointed,²²⁴ an estate is created,²²⁵ the automatic stay comes into effect,²²⁶ and U.S. avoidance powers are applicable.²²⁷ Such a case exemplifies the universality/plurality approach and is analogous to a concurrent insolvency, including an ancillary winding up, under Hong Kong law. An ancillary case, in comparison, is an innovation of U.S. law that permits the application of foreign law in the U.S. proceeding²²⁸ and therefore allows for the development of the universality/unity approach. An ancillary case is usually limited to the foreign debtor's property in the United States. A trustee is not appointed, the automatic stay does not come into operation, and an estate is not created. The foreign representative usually seeks injunctive relief to protect the foreign debtor's property in the United States and often seeks a turnover order.

To date, there have been two reported U.S. cases involving the recognition of Hong Kong insolvencies by U.S. courts: *In re Axona International Credit & Commerce Ltd.* ("Axona"),²²⁹ which was a Chapter 7 case commenced under Section 303(b)(4) of the U.S. Bankruptcy Code, and *In re Chingman Chan*,²³⁰ which was a Section 304 case. However, only *Axona* includes a detailed discussion of why Hong Kong insolvencies should be recognized and assisted by U.S. courts.²³¹ In this case, the bankruptcy court for the Southern District of New York granted the relief requested by the Hong Kong liquidators and the U.S. trustee, namely, the suspension of the U.S. liquidation and an order to transfer the U.S. assets to the

224. 11 U.S.C.A. §§ 701, 702 (West 1995).

225. *Id.* § 541.

226. *Id.* § 362.

227. For example, the strong arm powers, *id.* § 544, the ability to avoid preferences, *id.* § 547, and fraudulent transfers, *id.* § 548.

228. See *In re Metzeler*, 78 B.R. 674 (Bankr. S.D.N.Y. 1987).

229. *In re Axona International Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991) [hereinafter *Axona*].

230. *In re Chingman Chan*, 1993 U.S. Dist. LEXIS 7864 (S.D.N.Y. June 9, 1993). See also *Scientex Corp. v. Harry Kay*, Memorandum of Decision and Order, No. CV82-0410-RJK (C.D. Cal., July 28, 1986) (dismissing for reasons of comity a cross-claim against a company that was in the midst of liquidation in Hong Kong).

231. For a more detailed analysis of *Axona*, see Booth, *supra* note 15, at 220-29, and Booth, Case Comment, *Transnational Insolvency: Cross-Border Co-operation Between the United States and Hong Kong—In re Axona International Credit and Commerce Limited*, 23 H.K.L.J. 131 (1993).

Hong Kong liquidators to be administered in the Hong Kong proceedings under Hong Kong law. In determining whether to order the relief requested under Section 305 of the U.S. Bankruptcy Code, the court had to consider the application of the criteria in Section 304(c). (These criteria must also be considered by a court in determining whether to grant relief in a Section 304 case). Section 304(c) provides as follows:

In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.²³²

In explaining how Hong Kong law and procedures satisfy the Section 304(c) criteria, the court first focused on the fifth factor, comity, and emphasized that comity should be granted to the Hong Kong insolvency because Hong Kong is a sister common law jurisdiction whose company law is “derived from the British Companies Act.”²³³ This finding is especially important in the context of Hong Kong’s upcoming transition to Chinese rule; only time will tell whether Hong Kong remains a sister common law jurisdiction.

In discussing the other Section 304(c) criteria, the court also noted the following factors: that the Companies Ordinance “is strikingly similar” to U.S. bankruptcy law “and provides a comprehensive procedure for the orderly and equitable distribution of

232. 11 U.S.C.A. § 304 (West 1995).

233. *Axona*, 88 B.R. at 610.

assets;²³⁴ that Hong Kong law does not discriminate against foreign creditors;²³⁵ that Hong Kong law prevents preferential or fraudulent dispositions of property;²³⁶ and that the Hong Kong distribution scheme is substantially in accordance with the order prescribed by U.S. law.²³⁷

C. Chinese Law

In contrast to the cooperative approach demonstrated by England and the United States toward Hong Kong insolvencies, China adopts a territorial position and does not provide cross-border assistance. The case of *Liwan District Construction Company v. Euro-America China Property Limited*²³⁸ exemplifies the Chinese approach and is the only reported Chinese case involving the recognition of a foreign insolvency. The case involved a suit between a Chinese company, Guangzhou City Liwan District Construction Company, and a Hong Kong company, Hong Kong Euro-America China Property Co. Ltd. for breach of contract. The Chinese litigation was complicated by the fact that the Hong Kong defendant was in the process of being wound up in Hong Kong. The People's Court in Guangdong Province found that the liquidator who had been appointed in the Hong Kong liquidation lacked the authority to represent the Hong Kong party in the Chinese litigation. Ultimately, the People's Court protected the interests of the Chinese party, by, in effect, awarding it a "lien" on property in China that had been primarily financed by the Hong Kong defendant and had not yet been transferred to the plaintiff.

With 1997 approaching, bilateral cross-border insolvency matters involving Hong Kong and China have been the subject of increasing attention in both jurisdictions, both of which are in the process of reforming their respective insolvency law. It is understood that the Subcommittee on Insolvency intends to address these issues in its final report on Hong Kong insolvency law reform. The Chinese have also been considering these matters, and, as noted by a member of China's National Insolvency Law Drafting Team, China is ready to

234. *Id.*

235. *Id.* at 612.

236. *Id.* at 613.

237. *Id.*

238. *Liwan District Construction Company v. Euro-America China Property Limited*, A People's Court in Guangdong Province, reported Feb. 9, 1990, reprinted in Donald J. Lewis & Charles D. Booth, Case Comment, *Liwan District Construction Company v. Euro-America China Property Limited*, 6 CHINA L. & PRAC. 27 (1990). For a more detailed analysis of this case, see *id.*

take steps to cooperate with Hong Kong in cross-border insolvencies.²³⁹ However, this same member acknowledged that, at least in the near future, China will continue to adopt the territoriality approach.²⁴⁰

V. THE POST-1997 EVOLUTION OF HONG KONG'S TRANSNATIONAL INSOLVENCY LAW AND THE TREATMENT OF HONG KONG INSOLVENCIES BY FOREIGN COURTS

The continuing evolution of Hong Kong's transnational insolvency law after 1997 depends upon a variety of economic, political, and legal developments in both Hong Kong and China. Part A below discusses a variety of factors that will quite likely lead to an increase in the number of Hong Kong insolvencies, many of which will have cross-border implications. Part B explains why more Chinese enterprises²⁴¹ are likely to be wound up in backdoor liquidations in Hong Kong. Part C then discusses a variety of political and legal factors that will have further ramifications for the development of Hong Kong's transnational insolvency law, as well as affect whether foreign countries will continue to grant recognition and provide assistance to Hong Kong insolvencies. Additional recommendations to Hong Kong insolvency law are also proposed.

A. *Factors Likely to Increase the Number of Insolvencies in Hong Kong*

Hong Kong has historically had a low rate of insolvency, both in absolute terms²⁴² and as compared to rates elsewhere.²⁴³

239. Wang Wei Guo, Member of the National Insolvency Law Drafting Team, Chasing the Dragons: Business Protection in China and the New Asia, Remarks at the INSOL Conference Asia Pacific (Nov. 2, 1995) (on file with author).

240. *Id.*

241. In China, the term "enterprise" includes a broad variety of business entities. See GUIGUO WANG, BUSINESS LAW OF CHINA: CASES, TEXTS, AND COMMENTARY 145-46 (1993).

242. For example, in 1993-94, receiving orders were made in 318 bankruptcies and winding-up orders were made in 433 compulsory liquidations. OFFICIAL RECEIVER'S OFFICE ANNUAL DEPARTMENT REPORT, 1993-94, ¶ 3.6.2, at 5 (Hong Kong 1994) [hereinafter OFFICIAL RECEIVER'S 1993-94 REPORT]. In 1994-95, the number of bankruptcy cases in which receiving orders were made increased to 325 and the number of compulsory liquidations in which winding-up orders were made declined to 429. OFFICIAL RECEIVER'S 1994-95 REPORT, *supra* note 187, ¶ 3.7.2, at 5 (1995).

Recently, however, the number of insolvencies in Hong Kong has been increasing, and it is likely that this trend will continue.²⁴⁴ Many of these insolvencies will have transnational implications, and as the number of transnational insolvencies increases, the current weaknesses and ambiguities in Hong Kong's transnational insolvency law will become more apparent.

Many factors will likely cause an increase in the number of insolvencies in Hong Kong. First, the Hong Kong economy appears to be slowing down. This led some analysts to claim that "Hong Kong's economic growth has peaked and is in danger of stalling, judging by the latest economic data."²⁴⁵ Many commentators predict that this trend will continue throughout 1996.²⁴⁶ Meanwhile, frequent articles in the local press lament the sluggish property market, the decline in retail sales, and the increase in Hong Kong's unemployment rate.²⁴⁷

Second, poor economic conditions in many countries abroad may, in turn, lead to an increase in the number of insolvencies commenced in Hong Kong. For example, it was recently reported that insolvency is increasing among buyers from Hong Kong exporters; in particular, buyers from the United States are increasingly filing voluntary petitions under Chapter 11 of the U.S. Bankruptcy Code.²⁴⁸ It is possible that the foreign representatives in some of

243. For example, the average annual corporate failure rate in Hong Kong between 1985-86 and 1994-95 was 0.93%. OFFICIAL RECEIVER'S 1994-95 REPORT, *supra* note 187, Annex 6. In contrast, the annual failure rate in the United Kingdom between 1986 and 1988 was 2.27%. Edward L.G. Tyler, *Current Issues in Insolvency*, in COMMERCIAL LAW 17, 20 (Caroline Hague ed. 1991).

244. In 1992-93 there were 640 new insolvency cases in which either a receiving order or a winding up order was made. In 1993-94, this number increased to 751, and in 1994-95 to 754. This total of 754 new insolvencies marked an increase of 17.8% over the number of insolvencies in 1992-93 and .4% over the number in 1993-94, and is the highest number of insolvencies over the past decade. See OFFICIAL RECEIVER'S 1994-95 REPORT, *supra* note 187, ¶ 3.6.2, at 5, and Annex 5.

245. Simon Fluendy, *Party is over for HK, say analysts*, S. CHINA MORNING POST, Feb. 10, 1995 (Business Post), at 1.

246. See, e.g., Noel Fung, *Hang Seng Bearish on 1996*, S. CHINA MORNING POST, Dec. 1, 1995 (Business Post), at 3; Francine Brevetti, *Economic Woes Cloud Outlook*, ASIAN BUS., Nov. 1995, at 34.

247. See, e.g., Jonathan Braude, *Polls shows people fear ravages of unemployment; Pessimism reigns on the economy; Polls shows pessimism*, S. CHINA MORNING POST, Oct. 23, 1995, at 1; Ken Lee and Raymond Wang, *Land sale slump continues*, EASTERN EXPRESS, Oct. 18, 1995 (Business), at 17; Brevetti, *supra* note 246; Fung, *supra* note 246. For a more optimistic interpretation of this data, see Caspar W. Weinberger, *Hong Kong—Why All the Pessimism?*, FORBES, Nov. 20, 1995, at 33.

248. *Bankruptcies on Rise*, EASTERN EXPRESS, Dec. 1, 1995, at 19.

these cases may petition in Hong Kong under Part X of the Companies Ordinance to wind up the foreign buyers whose estates they represent in the U.S.. Such proceedings could enable the foreign representatives to secure the foreign debtors' Hong Kong assets for distribution to creditors in the United States. This scenario is also likely to arise with respect to Chinese enterprises. The poor state of the Chinese economy, which is discussed below in Part V.B, will most likely lead to the insolvency of more Chinese enterprises in the near future.²⁴⁹ In cases in which these enterprises have assets in Hong Kong, the foreign representatives from China will very likely be petitioning to have these enterprises wound up in Hong Kong.

Third, the enactment of the Law Reform Commission's bankruptcy recommendations will most likely lead to a dramatic increase in the number of bankruptcy cases. Currently, it is difficult, and often impossible, for a Hong Kong debtor to receive a discharge from bankruptcy.²⁵⁰ The existing discharge provisions are thus a disincentive to debtors who might otherwise petition for bankruptcy as a way to resolve their financial problems. In contrast, the proposed amendments to the discharge provisions are more debtor-friendly and provide for automatic discharge in most cases.²⁵¹ Once these proposals come into effect, many more debtors will likely file voluntary bankruptcy petitions to gain the benefits of a "fresh start."

Fourth, a related factor is that the increase in the use of credit cards by consumers in Hong Kong will also eventually cause an increase in personal bankruptcy. Recent statistics show that the amount charged on Visa and MasterCard in Asia last year increased 49% from the previous year.²⁵² Perhaps most importantly, given that the majority of Hong Kong's credit cardholders pay 24% interest per annum,²⁵³ many cardholders might eventually be forced to resort to the new Voluntary Arrangement Procedure, which was recently proposed by the Law Reform Commission,²⁵⁴ or to bankruptcy.

249. *Instances of state-run bankruptcies to surge*, EASTERN EXPRESS, Nov. 18-19, 1995, at 18.

250. The Law Reform Commission has noted that "for the overwhelming majority of bankrupts bankruptcy is a life sentence." REPORT ON BANKRUPTCY, *supra* note 4, ¶ 17.1, at 156.

251. *Id.*, ch. 17, at 156-78.

252. Nisha Gopalan, *Credit cards take charge in more ways than one*, EASTERN EXPRESS, Dec. 4, 1995 (Business), at 24 (citing the Nilson Report).

253. *Id.*

254. REPORT ON BANKRUPTCY, *supra* note 4, ch. 6, at 46-59.

Fifth, of course, if China causes any major disruption to Hong Kong's economy or attempts to assert any undue influence on Hong Kong's legal system or markets, investor confidence will most certainly plummet, causing flights of capital from Hong Kong and a downward spiral in the local economy.²⁵⁵ This, in turn, would lead to an increase in the number of both personal and corporate insolvencies in Hong Kong.

Sixth, if the current peg that exists between the Hong Kong dollar and the U.S. dollar²⁵⁶ is altered or abolished, the Hong Kong dollar will most likely fall in value and cause many local insolvencies. Moreover, the fact that people fear that the Hong Kong dollar may fall in value is in itself a factor that could precipitate such a fall. This danger is exacerbated by the fact that some global banks engage in what is locally called "ring fencing." "Ring fencing" involves "global banks refusing to stand behind deposits in their local branches in case a political upheaval makes it impossible to redeem them locally."²⁵⁷ (For example, Citibank has been alerting investors in the bank's Hong Kong dollar-denominated CDs "that they're on their own if the Hong Kong dollar disappears after 1997."²⁵⁸) Therefore, if Hong Kong depositors become overly worried about the future strength of the Hong Kong dollar and about the risks caused by ring fencing, they might decide to move their bank deposits to non-Hong Kong dollar accounts located offshore. A massive exodus from Hong Kong dollar deposits, could, in turn, put pressure on the Hong Kong dollar and eventually lead to its fall. Of course, a considerable increase in the number of insolvencies would result.

B. Factors Likely to Increase the Number of Liquidations of Chinese Enterprises in Hong Kong

The decision by the High Court to wind up CTIETCC,²⁵⁹ the fourteenth largest state enterprise in China and the first Chinese

255. See Adrian Kennedy, *Financiers fear exodus if Beijing interferes*, EASTERN EXPRESS, May 19, 1995, at 1.

256. The peg is now set at approximately HK\$7.8=US\$1.

257. *Hong Kong Timebomb*, ASIAN WALL ST. J., Feb. 28, 1995, at 6.

258. *Id.* The Hong Kong Monetary Authority believes that these "ring fencing" clauses should be removed or simplified because they unduly confuse and worry investors. *Call for end to ring fencing*, EASTERN EXPRESS, June 6, 1995 (Business), at 25. The Authority asserts that these clauses are unnecessary because under Hong Kong law an overseas company generally would not be liable for the debt payments by its local branch in the event of an "extraordinary" event such as war, insurrection, or civil strife. *Id.*

259. See *supra* notes 148-57 and accompanying text.

enterprise to be wound up in Hong Kong since World War II, demonstrates that it is now possible in Hong Kong to commence a backdoor liquidation against a Chinese enterprise—that is, the liquidation of a Hong Kong enterprise not in the process of being wound up in China. A “backdoor” liquidation enables creditors to avoid the pitfalls that are often encountered when attempting to enforce an arbitral award or judgment in China²⁶⁰ or when resorting to Chinese insolvency law. The fact that the English petitioner and CTIETCC settled their dispute²⁶¹ not long after the winding up was ordered demonstrates that additional benefits may result from pursuing such a course of action.

As China is now the biggest investor in Hong Kong,²⁶² there are a growing number of Chinese enterprises with a presence in Hong Kong. When creditors experience difficulty in reaching the assets of these enterprises, they are increasingly likely to commence “backdoor” liquidations in Hong Kong under Part X of the Companies Ordinance. There are two categories of Chinese enterprises that are more likely to be the target of such a strategy: those that are unable to pay and those that are unwilling to pay. There are a growing number of enterprises in each category.

With respect to the first category, economic conditions in China continue to weaken the financial condition of many Chinese enterprises, and the situation is likely to deteriorate further. For example, concerns have been growing about the massive amounts of triangular debt²⁶³ in China. In 1994 it was claimed that 390,000 state enterprises had run up a triangular debt of US\$69 billion, equal to 10% of China's GDP.²⁶⁴ Over the first nine months of 1995, this problem

260. Peter Stein, *How to Win and Lose in China's Civil Courts*, ASIAN WALL ST. J., Feb. 16, 1995, at 1,7.

261. The Hong Kong High Court granted a stay of the winding-up proceedings, but only after cryptically noting the court was not satisfied as to the “commercial morality” of the parties' confidential agreement. *Re China Tianjin Int'l Economic and Technical Cooperative Corp.*, Companies Winding Up No. 438 of 1994 (Oct. 16, 1995).

262. Adrian Kennedy, *Mainland is biggest investor*, EASTERN EXPRESS, Feb. 11-12, 1995, at 27 (quoting Denise Yue, the Hong Kong government director-general of industry).

263. “Triangular debt” is the name for the situation in which Chinese enterprises make loans or extend goods and services on credit to each other with the result that each of the enterprises is owed debts at the same time it owes debts to other enterprises, with none of the parties having sufficient money to repay its debts and end the deadlock. *Debts owed to industrial firms grow to HK\$718b*, S. CHINA MORNING POST, Dec. 8, 1995 (Business Post), at 5. However, the liquidation of one of the enterprises will break the deadlock if it causes the collapse of the other enterprises to which it owes money.

264. Edward Steinfeld, *China's Cash Cow Dinosaurs*, THE ASIAN WALL ST. J., Feb. 7, 1995, at 10.

eased only slightly.²⁶⁵ It was also recently reported that more than 41% of China's state enterprises lost money during this nine-month period, an increase of 1.17% over the same period in 1994,²⁶⁶ and that the total amount lost was approximately US\$5 billion, an increase of 18.8% over the comparable 1994 period.²⁶⁷ In addition, the average debt-to-assets ratio for state enterprises has reached a dangerous level of almost 80 percent,²⁶⁸ and almost one-quarter of all bank loans to China's state-sector is non-performing.²⁶⁹ Lastly, recent downgradings by Moody's Investors Service of the debt ratings of many Chinese banks and state enterprises will further hurt these institutions by raising the cost of their borrowing.²⁷⁰

With respect to the second category of enterprises, a growing number of Chinese state enterprises have been denying their liability to Western companies relating to massive losses that were allegedly incurred by the state enterprises in trading currency or a variety of financial instruments. It is interesting that many Western companies have apparently changed their debt collection strategy from one that involves quiet settlement with their Chinese partner or client to one that involves a more confrontational stance, including litigation and a publicity battle in the press.²⁷¹

265. Geoffrey Crothall, *Mainland state enterprise losses rise 20pc to \$38.75b*, S. CHINA MORNING POST, Oct. 20, 1995, at 1.

266. *Id.*

267. *Id.*

268. Shan Li and D. Daoqui Li, *Weaning China's Managers Off Easy Money*, ASIAN WALL ST. J., Dec. 4, 1995, at 6.

269. *Id.*

270. In April 1995, Moody's Investors Service downgraded the debt ratings of four major Chinese banks and downgraded or put on review the credit ratings of seven state enterprises. Erik Guyot & Kathy Chen, *Moody's Announces Downgrades Of Nonsovereign Chinese Debt*, ASIAN WALL ST. J., Apr. 20, 1995, at 1. Six months later, Moody's downgraded the long term debt of China International Trust and Investment Corp. ("CITIC"). Erik Guyot, *Moody's Downgrades Citic Beijing's Debt*, ASIAN WALL ST. J., Oct. 18, 1995, at 1.

271. The following disputes were reported earlier this year:

(1) In December 1994, Lehman Brothers filed suit in New York against China National Metals & Minerals Import & Export Corp. ("Minmetals") and its subsidiary Minmetals International Non-Ferrous Metals Trading Co. ("Minmetals Non-Ferrous") to recover US\$52.5 million and against China International United Petroleum & Chemicals Co. ("Unipecc") to recover US\$44 million that Lehman Brothers alleges was lost in foreign-exchange derivatives transactions. David Ibson, *New twist in Lehman's legal wrangle*, S. CHINA SUNDAY MORNING POST, March 26, 1995 (Money) at 1. Minmetals Non-Ferrous filed a US\$128 million counterclaim alleging that Lehman Brothers "lured a young and innocent trader into making derivatives deals he was unauthorised to conduct and unable to understand." David Ibson, *Lehman Brothers return fire in Minmetals legal battle*, S. CHINA SUNDAY MORNING POST, March 12, 1995, (Money), at 1. Lehman Brothers denied the charge and claimed that the trader was fully authorized to conduct the trading. *Id.* The U.S.

C. *Political and Legal Factors Likely to Affect the Post-1997 Evolution of Hong Kong Transnational Insolvency Law and the Treatment of Hong Kong Insolvencies by Foreign Courts*

1. Extent to which China Honors the Terms of the Joint Declaration and the Basic Law

At present, a foreign representative can come to Hong Kong and petition for the insolvency of the debtor (or the estate of the debtor that she represents) in a foreign proceeding. She can be confident that the winding-up will be administered fairly and efficiently and that the Official Receiver will operate independently when carrying out any necessary investigations. Similarly, a foreign investor or businessperson in Hong Kong can be confident that if problems arise with respect to her investment or transaction in Hong Kong, she will receive an impartial hearing in the Hong Kong courts. The future success of Hong Kong's transnational insolvency law, and of the continued recognition of Hong Kong insolvencies, depends on whether foreign representatives, investors, and businesspersons remain similarly confident after 1997, or, in other words, on whether the current legal system that is premised on the notion of the rule of law is maintained.

The most important factor that will determine whether the rule of law continues is whether China abides by the terms of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (the "Sino-British

court recently denied Lehman Brothers' motion to have the Minmetals Non-Ferrous counterclaims dismissed. *Minmetals Suit Against Lehman Will Be Allowed*, ASIAN WALL ST. J., Oct 20, 1995, at 3. Unipac has also counterclaimed, seeking US\$58 million in damages. *China's Unipac Files Countersuit Against Lehman Over Big Losses*, ASIAN WALL ST. J., March 16, 1995, at 2. Lehman Brothers countered by claiming that Unipac's "actions and allegations are simply a smoke screen to renege on their obligations." *Id.*

(2) Both Goldman Sachs and Bankers Trust are understood to have threatened to place stop-orders on some of their Chinese clients' accounts after their initial attempts to recover losses proved unsuccessful. David Ivison, *Banks get tough with China firms*, S. CHINA SUNDAY MORNING POST, Jan. 8, 1995, (Money), at 1; *Banks face snag over forex debts*, S. CHINA MORNING POST, Jan. 10, 1995, (Business Post), at 4.

(3) A group of fourteen brokers, including Lehman Brothers, Merrill Lynch & Co., and Credit Lyonnais Rouse, sued CITIC to collect more than US\$42 million following alleged losses on the London Metals Exchange from the unauthorized trading of copper futures by staff members of CITIC's Shanghai subsidiary. *CITIC Claims London Accord*, INT'L HERALD TRIB., March 20, 1995, at 11; Simon Fluendy, *Minmetals president replaced after derivatives debacle*, S. CHINA MORNING POST, Aug. 7, 1995. The dispute was eventually settled after two high-ranking officials were replaced. *See id.*

Joint Declaration")²⁷² and the terms of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the "Basic Law").²⁷³ If China honors the terms of the Sino-British Joint Declaration and the Basic Law, the laws of Hong Kong that are in effect prior to the transfer of sovereignty on July 1, 1997 will continue to be enforced by an impartial and competent judiciary for at least the next fifty years, subject, of course, to amendment by the Hong Kong SAR legislature. If so, the transfer of sovereignty might have little effect on Hong Kong transnational insolvency law. Foreign representatives, investors, and businesspersons will retain confidence in Hong Kong's economy and legal system, and foreign jurisdictions will continue to recognize and grant assistance to Hong Kong insolvencies.

If, however, China refuses to honor the terms of the Joint Declaration, new laws will be promulgated to replace the laws currently in force. If Hong Kong were to lose its autonomy and become just another region in China, foreign investors and businesspersons might well liquidate their Hong Kong investments and assets and repatriate their funds abroad. In addition, if Hong Kong's legal system were to lose its independence, foreign jurisdictions would be less likely to recognize or assist Hong Kong insolvencies. For example, it would be more difficult for Hong Kong insolvencies to gain recognition and assistance from U.S. courts if Hong Kong were deemed to be a Chinese, rather than a sister common law, jurisdiction.

272. The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, *reprinted in* PUBLIC LAW AND HUMAN RIGHTS—A HONG KONG SOURCEBOOK 45 (Andrew Byrnes & Johannes Chan eds. 1993) [hereinafter the Sino-British Joint Declaration]. The Sino-British Joint Declaration provides that Hong Kong will become a Special Administrative Region in the People's Republic of China (the "Hong Kong SAR") directly under the authority of the Central People's Government of the People's Republic of China and that the Hong Kong SAR is to "enjoy a high degree of autonomy." Sino-British Joint Declaration, ¶¶ 1-3(2) & (12). The Declaration also provides that the judiciary is to remain independent and that "[t]he laws currently in force in Hong Kong will remain basically unchanged." Sino-British Joint Declaration, ¶ 3(3). These latter provisions were incorporated respectively into Articles 2 and 8 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, ch. 1, arts. 2, 8, *reprinted in* PUBLIC LAW AND HUMAN RIGHTS, at 84-85 [hereinafter The Basic Law], which will become the constitution of the Hong Kong SAR on July 1, 1997. Article 2 provides that the Hong Kong SAR is to enjoy "independent judicial power, including that of final adjudication." Basic Law, ch.1, art. 2. Article 8 provides that the laws in force in Hong Kong prior to the transfer, other than those made in the United Kingdom, but including the common law and the rules of equity, shall be maintained unless they contravene the Basic Law, and shall be subject to amendment by the Hong Kong SAR legislature. Basic Law, ch. 1, art.8.

273. *See supra* note 272.

A third, and perhaps the most likely, scenario is that China will pursue a middle ground in which many of the laws will remain unchanged, but in which the application or enforcement of those laws might become less impartial. Moreover, China might put forth increasingly aggressive interpretations of the Sino-British Joint Declaration or the Basic Law.²⁷⁴ Under this approach, China would abide by the "letter" rather than the "spirit" of the law. The international community's response would depend on the extent to which it perceives that Hong Kong's legal system has changed.

Only time will tell which approach China will adopt. In the meantime, at least one overseas court has already voiced concern about the future of Hong Kong's legal system.²⁷⁵ In this recent case, which involved the death of an American woman who drowned in a swimming pool in a Hong Kong hotel, the Massachusetts District Court, justified, in part its exercise of personal jurisdiction over a Hong Kong defendant by noting the "uncertain future of the Hong Kong legal system, given the island's reversion to Chinese sovereignty in less than two years."²⁷⁶ This case led the Hong Kong government to appoint a top legal official to visit the United States to address lawyers, major corporations, and U.S. legal institutions in an attempt to increase confidence in the territory's legal system.²⁷⁷

2. Repercussions of Winding Up More Chinese Enterprises in Hong Kong

It will most likely become increasingly difficult to find lawyers who are willing to represent petitioners against Chinese enterprises or accountants who are willing to serve as liquidators and thoroughly investigate and gather the assets of Chinese enterprises. The latter problem was encountered in the liquidation of CTIETCC. Reports indicated that accountants from a major accounting firm withdrew from being considered for appointment because their firm was

274. Recently, the Preliminary Working Committee adopted this approach when asserting that certain aspects of the Hong Kong Bill of Rights violated the Basic Law and should be abolished. Senior Chinese officials later publicly announced that they supported the recommendations of the Preliminary Working Committee. See No Kwain-Yan & Chris Yeung, 'Bill of Rights must go': China backs proposal to remove statute's power to 'override' legislation, S. CHINA MORNING POST, Oct. 19, 1995, at 1.

275. Nowak v. Tak How Investment Ltd., Civ. A. No. 94-11691-WGY (unrep.) (D. Mass. 1995).

276. *Id.*

277. Ruth Mathewson, *Law chief to take war on gloom to States*, S. CHINA MORNING POST, Sept. 17, 1995, at 3.

"concerned about its own position" in Hong Kong after 1997.²⁷⁸ In addition, if many more "backdoor" liquidations of Chinese enterprises occur in Hong Kong (and especially if they involve enterprises with ties to powerful individuals in China), China may exert pressure either to prevent such liquidations from occurring at all or to prevent the Official Receiver or other liquidators from carrying out proper investigations.

3. Impact of the Law Reform Commission's Recommendations Regarding the Official Receiver's Powers

One of the most important features of the Law Reform Commission's Report on Bankruptcy is the recommendation to enact a variety of procedures contained in the U.K. Insolvency Act of 1986 that increase the Official Receiver's powers. The Commission proposes to give the Official Receiver the discretion to choose whether to serve as trustee and therefore whether to hold the first meeting of creditors.²⁷⁹ In any case, the trustee is required to call the first meeting of the creditors' committee within three months of his appointment or of the establishment of the committee, whichever is later.²⁸⁰ However, subsequent meetings of the committee will no longer be held monthly, as is the current practice.²⁸¹ Instead, subsequent meetings will be held when determined by the trustee, when requested by a member of the creditors' committee, or when determined at a previous meeting of the creditors' committee.²⁸² Another recommendation of the Law Reform Commission reduces the quorum for all creditors' meetings to one creditor present or represented.²⁸³

These reforms streamline the bankruptcy process and thereby make it more efficient. However, there are two important disadvantages to the proposed reforms. First, since the Official Receiver has

278. *Hong Kong Timebomb*, *supra* note 257.

279. REPORT ON BANKRUPTCY, *supra* note 4, ¶¶ 8.7-11, at 69-70. However, the Official Receiver is required to hold the first meeting of creditors if so requested by not less than one-quarter, in value, of the debtor's creditors. *Id.* ¶ 8.12, at 70.

280. *Id.* ¶ 9.10, at 78. However, the Law Reform Commission did not recommend adoption of all the United Kingdom provisions that strengthen the powers of the Official Receiver. For example, the Law Reform Commission decided not to adopt the provision that provides that a creditors' committee is not established in cases in which the Official Receiver serves as the trustee. *Id.* ¶ 9.15, at 79-80.

281. See Bankruptcy Ordinance § 24(3).

282. REPORT ON BANKRUPTCY, *supra* note 4, ¶ 9.10, at 78.

283. *Id.* ¶¶ 8.14-8.15, at 70-71. At present, the quorum is three creditors, or all the creditors if there are fewer than three creditors. Meetings of Creditors Rules, Rule 24, cap. 6 sub. leg. D, L.H.K. (1995).

the discretion to decide against holding the first meeting of creditors, perhaps over the objection of minority creditors who are unable to meet the one-quarter-in-value requirement, this reform could possibly lead to difficulties in gaining the cooperation of U.S. courts that adopt the approach of the district court in *Interpool, Ltd. v. Certain Freights of M/V Venture Star* ("Interpool").²⁸⁴ In that case, the court refused to assist an Australian liquidation proceeding because it failed to provide U.S. creditors with similar substantive and procedural protection as is provided in the U.S. Bankruptcy Code. Among the factors noted by the court was that the Australian liquidator had failed to meet with creditors to discuss an important agreement that the liquidator later entered into with one of the company's creditors.²⁸⁵ The fact that Australian law provides other procedures to safeguard the interests of creditors, albeit different from those included in the U.S. Bankruptcy Code, demonstrates that this case was wrongly decided.²⁸⁶ However, to avoid the possibility that other U.S. or foreign courts might nevertheless adopt the *Interpool* approach, the Official Receiver should be required to hold the first meeting of creditors in any bankruptcy in which cross-border cooperation might become necessary.

A more fundamental objection to the new discretionary powers of the Official Receiver is that such a change is misguided in the context of the new era that will be ushered in by 1997. One of the main strengths of the current insolvency process in Hong Kong is the independence of the Official Receiver. However, given the uncertainties about the future of the civil service,²⁸⁷ one must query whether the Official Receiver will remain independent after 1997. If he

284. 102 B.R. 373 (D.N.J. 1988), *appeal dismissed*, 878 F.2d 111 (3d Cir. 1989).

285. *Id.* at 378-79.

286. See Booth, *supra* note 15, at 200-12. See also Daniel M. Glosband & Christopher T. Katucki, *Current Developments in International Insolvency Law and Practice*, 45 BUS. LAW. 2273, 2277-78 (1990); Michael R. Hughes, *An Australian Perspective on Interpool*, 2 INT'L INSOLVENCY & CREDITORS' RTS. REP. 32, 33-34 (1990); Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 474-78 (1991).

287. For example, China caused a stir when it demanded that the Hong Kong government allow it to review civil servants' files before 1997. See Kevin Murphy, *China Says Hong Kong Civil Servants Can Keep Jobs After '97*, INT'L HERALD TRIB., June 26, 1995, at 4. Recently, however, China attempted to reassure Hong Kong's civil servants by announcing that they will be able to continue their employment past 1997 under existing conditions. *Id.* But it remains unclear whether civil servants will be able to retain their current positions. One member of the Hong Kong Legislative Council has questioned whether the "vetting process" for senior Hong Kong civil servants will be to ensure that all appointees "will have 'politically correct' views." Christine Loh, *The CCP and the Rule of Law in Hong Kong*, 25 H.K.L.J. 149, 151 (1995).

retains his independence, then it is possible that China will attempt to curtail his powers; if he does not, then it is likely that the Official Receiver may not exercise his responsibilities as diligently as he does at present. If foreign representatives, investors, and businesspersons perceive that the Official Receiver has lost his independence, they will rightly begin to worry about whether the interests of creditors will continue to be adequately protected in Hong Kong insolvency proceedings. Similarly, foreign courts might well be more reluctant to recognize and assist Hong Kong insolvencies.

The irony is that although the Law Reform Commission proposed to strengthen the Official Receiver's powers as a means of improving Hong Kong's insolvency procedures, these recommendations may eventually have the opposite effect. A better alternative would be to decentralize the insolvency process and to decrease the role played by the Official Receiver. A first step could be to appoint trustees and liquidators from private panels of insolvency practitioners.²⁸⁸ It is understood that the Official Receiver is not averse to such a change. Second, the role played by creditors and creditors' committees should be expanded. To ensure that creditors become more involved in the bankruptcy and liquidation process, reforms should be enacted to increase the likelihood of larger distributions being paid to creditors. One possibility would be to strengthen the avoidance powers.

VI. CONCLUSION

The common law development of Hong Kong's cross-border insolvency law has, for the most part, served Hong Kong well. But with the likelihood that many more transnational insolvencies will arise in the near future and with 1997 fast approaching, it is no longer satisfactory to refer primarily to English case law to resolve those matters of great local concern that involve transnational insolvency. Greater consistency and predictability would result if many of the applicable common law principles were incorporated (with clarification or supplementation, as need be) into the Companies Ordinance, the Bankruptcy Ordinance, and other legislation as necessary. Other amendments should be made to clarify and update the existing statutory guidelines in Part X of the Companies Ordinance and relevant sections of the Bankruptcy Ordinance. These changes would

288. The Law Reform Commission raised this possibility as one of two alternatives for choosing supervisors for the proposed voluntary arrangement procedures. REPORT ON BANKRUPTCY, *supra* note 4, ¶¶ 6.15-23, at 52-53.

all facilitate greater cross-border cooperation.

If cross-border trade and investment between Hong Kong and China are to continue growing at a rapid pace, it is crucial for Hong Kong and China to reach agreement on a variety of bilateral cross-border insolvency issues, including the recognition of insolvencies and the types of assistance that Hong Kong and China may provide to each other's insolvencies. After the resumption of Chinese sovereignty over Hong Kong in 1997, it will be especially important for insolvencies in the Hong Kong SAR to be recognized elsewhere in China. To assist in implementing a cross-border insolvency agreement, Hong Kong and China could establish a cross-border insolvency panel that includes members from both Hong Kong and China.²⁸⁹

Of course, any reforms enacted during the transition period could be undermined if China fails to honor the terms of the Sino-British Joint Declaration or the Basic Law and instead imposes its own transnational cross-border approach. Likewise, any interference by China with the administration of Hong Kong insolvencies (or with Hong Kong's economy or legal system generally) could have serious ramifications for the treatment of Hong Kong insolvencies by foreign courts. Thus, Hong Kong and China should take steps to ensure that foreign representatives, investors, businesspersons, and courts worldwide all remain confident about the future independence of Hong Kong's economy and legal system.

289. This was the approach recently adopted to implement the cross-border bank accord that China and Hong Kong entered into in late 1994.

